Supreme Court, U.S.
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No. _____

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In The
Supreme Court of the United States
October Term, 1998

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FRANCISCA CASTILLO, GILBERT CASTILLO, as Administrator of the Estate of JESUS CASTILLO,
Deceased,
Petitioners,

vs.

CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) and OFFICER SAMMY LEDESMA (#4112),
Respondents.

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On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the police practice of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia objectively reasonable as a matter of law?

2. Is the police policy of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia constitutionally protected as a matter of law from claims of deliberate indifference to a substantial risk of severe medical harm?

3. Is the police practice of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia an objectively unreasonable application of deadly force contrary to the teachings of *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)?

4. Does the Court of Appeals for the Fifth Circuit ruling in *Colston v. Barnhart,* 130 F.3d 96 (5th Cir. 1997), pet. reh'g en banc denied, 146 F.3d 282 (5th Cir. 282 (5th Cir. 1998, cert. denied, ____ U.S. ____ (1999), applied here so as to allow interlocutory review of excessive force, use of deadly force, and deliberate indifference to medical needs claims where the district court denied summary judgment, finding that material fact issues regarding the

actions taken by police officers existed, violate the rule in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and the finality rule of 28 U.S.C. § 1291 which prohibits interlocutory review of issues of law not separable from the fact determinations necessary to their resolution?

LIST OF ALL PARTIES TO THE PROCEEDING IN COURT BELOW

This action was initiated by FRANCISCA CASTILLO, GILBERT CASTILLO, as Administrator of the Estate of JESUS CASTILLO, Deceased,

OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) and OFFICER SAMMY LEDESMA (#4112) are the Defendants in this case and is properly designated in the present caption.

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I. The Supreme Court should grant this petition for writ of certiorari because the Court of Appeals' holding, as matter of law, that the police practice of handcuffing the hands and feet of an arrestee in a prone position while exerting pressure on their back (a practice known as "hog-tying") to the point of causing positional asphyxia is a

constitutionally reasonable permissible practice violates the teaching of Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d. 1 (1985). 11

II. The Supreme Court should grant this petition for writ of certiorari to resolve the conflict between the Seventh and Eighth Circuits (Estate of Phillips v. City of Milwaukee, 123 F.3d 586 (7th Cir. 1997) and Maynard v. Hopwood, 105 F.3d 1226 (8th Cir. 1997) which have held that forcing an arrestee into a prone position with hands and feet cuffed ("hog-tying") as pressure is applied to their back is objectively reasonable as a matter of law and the Fifth Circuit Court of Appeals which finds said police practice to be a clearly established violation of the Fourth Amendment prohibition against unreasonable searches and seizures. See, Simpson v. Hines, 903 F.3d 400 (5th Cir. 1990) and Gutierrez v. City of San Antonio, 139 F.3d 441 (5th Cir. 1998). 12

III. This Court should grant certiorari because the Fifth Circuit's extra-jurisdictional consideration of the interlocutory appeal based on qualified immunity squarely conflicts with Johnson v. Jones, 515 U.S.

304 (1995), which holds that a defendant may not appeal a district court summary judgment order denying qualified immunity insofar as that order determines whether or not the pre-trial record sets forth a genuine issue of fact for trial. 22

IV. This Court should exercise its supervisory power and grant certiorari because the Fifth Circuit's decision is a significant departure from the accepted and usual course of judicial proceedings in that the Fifth Circuit opinion effectively makes every denial a qualified immunity immediately appealable, in violation of the limited interlocutory review permitted by Johnson, supra, and Behrens, supra. 28

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In The
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FRANCISCA CASTILLO, GILBERT CASTILLO, as Administrator of the Estate of JESUS C STILLO,
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CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) and OFFICER SAMMY LEDESMA (#4112),
Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

The Petitioners, Francisca Castillo and Gilbert Castillo, as Administrator of the Estate of JESUS CASTILLO, Deceased, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this

case entered on March 15, 1999.

OPINIONS BELOW

The panel opinion denying the Petitioner's Petition for Rehearing is not reported, but is reprinted hereto in the Appendix at A-2. The panel opinion of the Court of Appeals for the Fifth Circuit is not published pursuant to Federal Rules of Appellate Procedure - Fifth Circuit Local Rule 47.5 and is reprinted in Appendix A hereto ("App. A") at page A-4. The order of the District Court, signed February 2, 1998, and filed on the same date, is not reported, and is set out in the appendix at page A-14.

JURISDICTION

The Petition for Rehearing was denied on May 4, 1999. (App. A-2) The Fifth Circuit Court of Appeals entered its judgment on March 15, 1999. (App. A-4)

The jurisdiction of this Court is invoked under 28 U.S.C.

§§ 1254(1) and 2101(c).

CONSTITUTIONAL, STATUTORY, REGULATORY & RULE PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution set out in its entirety in the Appendix at A-1. Additionally, this case involves the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 which is set out in its entirety in the Appendix at A-1. This case also involves Fed. R. Civ. P. 56(c), set out in its entirety in the Appendix at A-1.

STATEMENT OF THE CASE

With all due respect to the Fifth Circuit Court of Appeals and recognizing the immense burden of the overworked resources of the Court, the Petitioners, nevertheless, respectfully, but most vigorously object, to the factual resuscitation by the Fifth Circuit Court of Appeals, whose opinion incorrectly states, or adopts as fact, accounts solely from the standpoint of the police officer.

The Fifth Circuit neither mentioned nor credited the Affidavit of the Chief Medical Examiner of Travis County, Texas, who performed the autopsy on Jesus Castillo; the opinion of police tactics expert, Dr. Peter Scharf; or the numerous eyewitness statements all contained in the Plaintiffs' Response to Defendant's Motion for Summary Judgment.[1]

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[1] In connection with the circuit court's rendition of the facts, it is significant that the Fifth Circuit Court of Appeals Rules require that the complete record of the case remain at the trial court during the appeal process, therefore, the Fifth Circuit Court of Appeals did not have the benefit of the full record when it issued its decision. Specifically, the oral deposition of Defendant police officer, Michael Kincaide, which was considered by the trial court, was not before the Fifth Circuit Court of Appeals during its consideration of this case.

Clearly, Officer Kincaide's deposition was before the trial court for the purposes of summary judgment. At the hearing on Defendants' Motion for Summary Judgment, the Defendants' objection to Plaintiff's counsel's reference to Kincaide's deposition, based on it not being part of the record, was overruled by the magistrate.

Officer Kincaide's deposition is attached as A-97 and the transcript of the hearing on Defendant's Motion for Summary Judgment before Magistrate Alan D. Albright is attached hereto as A-29. On page 29 of the transcript, Magistrate Albright's ruling leaves no doubt that Officer Kincaide's deposition was included in the

The summary judgment evidence which was before the trial court and upon which the court based its denial of the police offices' motion for summary judgment presented the following facts:

1. Jesus Castillo, a thirty-nine year-old Hispanic male, died of anoxic encephalopathy due to cardio respiratory arrest, known as positional asphyxia, caused by oxygen deprivation as a result of the application of weight to the back of a prone person handcuffed, face-down, such that the person suffers oxygen deprivation and eventual death by positional asphyxia from pressure. (A-33, A-44)

2. Placing an arrested person, who is being handcuffed in a prone position will not only cut off oxygen, but also causes the subject to struggle to catch a breath with such a struggle often resulting in more pressure being applied. (A-33)

3. Placing a suspect in a prone position with pressure applied to their back while handcuffed with their hands behind their back from four to six minutes, is a classic example of the substantial risk of death or serious bodily injury by positional asphyxia. (A-33)

4. Jesus Castillo was mentally ill and on January 5, 1995,

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record and considered by the court.

was walking in shorts in 30 degree weather on Interstate 35 and Highway 620, in Round Rock, Travis County, Texas. (A-4)

5. The Round Rock Police Department was called to the scene after Jesus Castillo had taken a twelve-pack of beer and some popcorn from a Texaco station that had recently been owned by his family, although it was not so owned at the time on January 5, 1995. (A-97)

6. Michael Kincaide, a Round Rock police officer, who had known Mr. Castillo since they were children and who attended high school with him and who knew that Jesus Castillo was "not normal" was the first officer upon the scene. (A-97; Kincaide depo., vol. I, p.68)

7. Officer Kincaide ordered Jesus Castillo to put down the beer, and he complied. (A-101)

8. Mr. Castillo raised his hands as if to surrender when ordered to do so by Officer Kincaide. (Witness Statement Marlyn Michael Hart, appendix II.B.11, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; R.684-881)

9. Jesus Castillo never threatened the officers nor raised the beer bottle in a threatening manner. (A-101)

10. Officer Kincaide was aware of the fact that Mr. Castillo's family had recently owned the Texaco station from which Mr. Castillo allegedly took the beer and popcorn. (A-97; Kincaide depo., vol. I, p.68)

11. Officer Kincaide shoved his knee into Mr. Castillo's neck area and stayed in that position for a period of five to ten minutes. (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment)

12. Officer Kincaide and others remained on Mr. Castillo's back while he was handcuffed with his hands behind him and his feet handcuffed for a period of four to ten minutes. (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; also, A-33)

13. While bound with his hands behind his back in a "hog-tied" position, Mr. Castillo yelled out a number of times that he was going to die and stated, "God, please help me!" (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; Walter David Barrera, appendix II.3.D, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; R.684-881)

14. While bound, with officers on his back and his hands tied in a "hog-tied" position, Mr. Castillo shouted, "it is time for me to die!" (Witness Statement of Andres Leal, attached as appendix II.B.14, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; Walter David Barrera, appendix II.3.D, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment; R.684-881)

15. Mr. Castillo turned blue while Officer Kincaide and the

others were on his back. (A-33)

16. An ambulance was called for the purpose of assisting Officer Kincaide with numerous injuries and not to help Mr. Castillo. (A-4)

17. When the ambulance did arrive, it was discovered that Mr. Castillo was not breathing. The ambulance transported Mr. Castillo to a hospital. (A-4)

18. When the ambulance arrived, Mr. Castillo's vital signs indicated that his brain was severely deprived of oxygen at a level indicating that brain death had occurred. (Emergency Medical Services Records, attached as appendix II.E, in support of Plaintiffs' Response to Defendants' Motion for Summary Judgment)

19. Mr. Castillo was taken off life support and died shortly thereafter. (A-4)

20. The Travis County Medical Examiner, Dr. Roberto Bayardo, conducted an autopsy as required by Texas law and concluded that Officer Kincaide had adequate time to recognize Mr. Castillo's breathing difficulties since a person's heart will not stop beating due to lack of oxygen unless they have gone without breathing for at least three to four minutes, even during a struggle. (A-44)

21. Officer Kincaide had adequate time to investigate and determine Mr. Castillo's condition. (A-33)

22. The severe risk of death and serious bodily injury from

positional asphyxia was a commonly known problem about which a reasonable officer should have been aware of on or about January 5, 1995. (A-52)

23. Well-known police agencies, such as the International Association of Police Chiefs and the National Institute of Justice had repeatedly warned police departments concerning the risks of positional asphyxia when force such as that used by Officer Kincaide is applied to the back of a prone suspect with their hands handcuffed behind them (often called "hog-tying") and that widely acknowledged and recognized professional papers on positional asphyxia had been published in police journals and other law enforcement literature since the late 1980s and that placing weight on the back of a prone handcuffed person with weight applied to their back for a period of several minutes is an unreasonably dangerous police procedure and one that was widely known and extensively discussed in law enforcement literature since the 1970s. (A-52)

24. That there were at least six (6) adult males on top of Mr. Castillo during the struggle, including three (3) Round Rock police officers, including Officer Kincaide. (A-52, A-59)

25. Hog-tying or handcuffing behind the back while in the face down, prone position has long been recognized by reputable police agencies as a life threatening tactic and prohibited by police regulations. (A-59)

26. The Fifth Circuit Court of Appeals concluded, based on the

facts as stated above in the light most favorable to the non-movant, that:

a. the degree of force exerted under the circumstances was not unreasonable, either quantitatively or qualitatively;
b. the officers did not deliberately disregard Jesus Castillo's health needs;
c. that the procedures used by the officers were well within police norms;
d. both the time and extent of the force used on Jesus Castillo were reasonable, if not minimal;
e. that the abandonment of force and commencement of concern for the health of Jesus Castillo were timely and appropriate;
f. that there was no constitutional violation by the Round Rock police officers.

PROCEEDINGS BELOW

The District Court granted the Defendant's Motion for Summary Judgment on the Plaintiffs' Fifth and Eighth Amendment claims. The District Court denied the Defendant's summary judgment motion based on qualified immunity on Plaintiffs' Fourth and Fourteenth Amendment claims. The court specifically found that "there are material fact issues which

preclude it from determining whether the Defendant's actions were 'objectively reasonable,'" as noted by the court. Among those factual disputes are the cause of the altercation between Kincaide and Mr. Castillo, the manner in which Mr. Castillo held the beer bottle, the extent to which Mr. Castillo allegedly resisted the arrest, as well as the length of time he resisted the officer's efforts to restrain him, and the length of time that Mr. Castillo was held in a prone position. It is also disputed as to whether or not Mr. Castillo notified the officers that he was in extreme pain and was "going to die."

A panel of the Fifth Circuit reversed and rendered in an unpublished opinion. (A-4) Plaintiffs' Petition for Rehearing was denied on May 4, 1999. (A-2)

REASONS FOR GRANTING THE PETITION

I. The Supreme Court should grant this petition for writ of certiorari because the Court of Appeals' holding, as matter of law, that the police practice of handcuffing the hands

and feet of an arrestee in a prone position while exerting pressure on their back (a practice known as "hog-tying") to the point of causing positional asphyxia is a constitutionally reasonable permissible practice violates the teaching of *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d. 1 (1985).

II. The Supreme Court should grant this petition for writ of certiorari to resolve the conflict between the Seventh and Eighth Circuits (*Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997) and *Maynard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997) which have held that forcing an arrestee into a prone position with hands and feet cuffed ("hog-tying") as pressure is applied to their back is objectively reasonable as a matter of law and the Fifth Circuit Court of Appeals which finds said police practice to be a clearly established violation of the Fourth Amendment prohibition against unreasonable searches and seizures. *See, Simpson v. Hines*, 903 F.3d 400 (5th Cir. 1990) and *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998).

This Court should grant certiorari because the constitutional limitations placed on the use of deadly force are of extraordinary importance given that the use of deadly force amounts to the potential extra-judicial summary imposition of the death penalty in every case. The extraordinary importance of the

proper limits to be placed on the government's use of deadly force is self-evident. The absence or erosion of these limitations permit the government to summarily impose the death penalty without due process or other judicial oversight.

This Court, in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), held that, "all claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather that under a 'substantive due process' approach." *Supra*, 490 U.S. at 395, 104 L.Ed.2d. at 454. The reasonableness inquiry in an excessive force case is an objective one. "The question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham, supra,* at U.S. 397.

In the instant case, the Defendant officers utilized a degree of force which resulted in the death of Jesus Castillo. Specifically, the police officers first attacked the deceased by knocking a beer bottle out of his hand without provocation at a moment when Mr. Castillo raised his arms to surrender in compliance with the officers' commands. Most significantly, however, Officer Kincaide then proceeded to force Mr. Castillo to the ground in a prone position. Mr. Castillo's hands were pulled behind him while persons sat on him. Mr. Castillo's hands were handcuffed tightly behind him, and his legs were also cuffed. Officer Kincaide shoved his knee into Mr. Castillo's neck during the restraint. Officers sat on Mr. Castillo to hold him down. Mr. Castillo remained in this unfortunate restraint between five and ten minutes. Once the officers realized Castillo's condition, it was too late. He became unconscious at the scene, never to awake again.

Notwithstanding the well-known and substantial risks of

positional asphyxia and the actions resulting in positional asphyxia, the Fifth Circuit held, as a matter of law in this case, that the force described above and utilized by the Round Rock police officers was reasonable, "if not minimal." The Circuit Court's decision has granted permission to police officers across the country to use deadly force irregardless of the danger or risk posed by the suspect. (A-4) Petitioners contend that the force utilized by the Defendant officers constituted deadly force and was "unreasonable" as a matter of law under *Graham v. Conner, supra*, and *Tennessee v. Garner, supra*.

In *Garner,* the U.S. Supreme Court held that police use of "deadly force" violates the Fourth Amendment unless the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or to others. 471 U.S. at 11, 105 S.Ct. at 1701. "Deadly force" is not necessarily limited to the use of guns, but may be any force "carrying with it a

substantial risk of causing death or serious bodily harm." *Robinette v. Barnes*, 854 F.2d 909, 911-12 (6th Cir. 1988).. *Also, see,* Tex. Penal Stat. Ann. § 1.07(17); Tex. Code of Crim. P. Ann. art. 6.06, "An Officer uses deadly force only in situations which indicate that he or another person may be seriously injured or killed if such deadly force is not used."

Contrary to the Fifth Circuit's opinion, placement of a person's body who has participated in a strenuous activity in a prone position with his hands handcuffed behind him and weight placed upon his back, carries with it a substantial risk of causing death or serious bodily harm, and, therefore, constitutes "deadly force." This is established by Petitioners in their summary judgment proof through the Affidavit of Dr. Roberto Bayardo, the Chief Medical Examiner of Travis County, Texas (A-33), and through the Declaration of Peter Scharf, an expert in law enforcement procedures. (A-52)

Rather than properly allow the Plaintiff to submit evidence on Defendants' actions as constituting "deadly force" for consideration by the fact finder, the Fifth Circuit completely ignored the issue of "deadly force" and Plaintiffs' summary judgment evidence. Viewing the summary judgment evidence in the light most favorable to the plaintiff (Dr. Bayardo's affidavit and Dr. Scharf's declaration), questions of fact were presented on the issue of "deadly force." *See, Chew v. Gate*, 27 F.3d 1432 (9th Cir. 1994) (suggesting that whether a given tool or instrument in certain circumstances is "deadly force" is a question of fact). In essence, the Fifth Circuit approved utilizing "deadly force" against an unarmed, mentally ill citizen who had not committed any violent crime at the time of his seizure by the defendant police officers.

Other circuits place more severe limitations on the use of deadly force. *See, Gilmere v. City of Atlanta, Georgia*, 774 F.2d

1495, 1502 (11th Cir. 1985) (en banc) (the unwarranted beating and shooting of the plaintiff, which directly resulted from his efforts to escape the officers' further physical abuse, gave grounds for relief under the Fourth Amendment); *Davis v. Little*, 851 F.2d 605, 607 (2nd Cir. 1988) (shooting of unarmed citizen running toward back of car unlawful); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (material questions of fact precluded summary judgment regarding shooting of disturbed man who held police at bay with knife and was subsequently shot because of man's actions, even if dangerous, threatening, or aggressive, did not necessarily pose a threat of serious physical harm).

One of the most glaring conflicts exist between the Fifth Circuit's holdings, in *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998) and *Simpson v. Hines*, 903 F.2d 400 (5th Cir. 1990), and the Seventh and Eighth Circuits' decisions in

Estate of Phillips v. City of Milwaukee, 123 F.3d 586 (7th Cir. 1997) and *Maynard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997), respectively. These cases involve the death of an arrestee in police custody. In *Gutierrez*, the arrestee died of being hog-tied and placed in a prone position with his face down. The arrestee in *Simpson* was also left in a prone position with hands and feet cuffed. In *Simpson*, as in the instant case, an officer sat on the arrestee's back. In *Estate of Phillips*, the medical examiner stated the cause of death as "sudden, unexpected death associated with law enforcement restraint." 123 F.3d at 590. Mr. Phillips, like Mr. Castillo, had been placed in a prone position, face down, with both his hands and feet handcuffed and weight placed on his back. The *Maynard* arrestee was hog-tied. The plaintiffs in each case argued that the officers' actions constituted deadly force and was unreasonable under the Fourth Amendment.

The *Gutierrez* court properly held that the existence of

"deadly force" is a question of fact, while the *Estate of Phillips'* and *Maynard's* courts decided the "deadly force" issue as a matter of law. The courts' opinions in *Estate of Phillips* and *Maynard,* established the constitutionality, as a matter of law, of the police practice which resulted in the arrestee's death. As in the instant case, these courts denied the plaintiffs an opportunity to present all of the evidence, including the critical evidence of the credibility of the officers, to the trier of fact.

The Fifth Circuit's opinion in the instant case also creates a confusing intra-circuit conflict. The instant case conflicts with both *Gutierrez, supra*, and *Simpson, supra*. The *Simpson* facts are similar to those herein. In *Simpson,* the plaintiff decedent was a prisoner in a local jail. When he refused to submit to a search and brandished a marijuana cigarette, two law enforcement officers entered his cell. A struggle ensued with the officer defendants later contending that Simpson violently resisted their efforts to search

his pockets, however, plaintiff maintains that Simpson was struggling in self-defense. One officer put his arm around Simpson's neck, while other officers grabbed Simpson's arms and legs. The officers forced Simpson to the floor and attempted to handcuff him while another officer sat on his chest. Unable to restrain Simpson in this position, they rolled Simpson on his stomach and cuffed his hands and legs behind his back. Simpson died as a result of the struggle with the custodial death report stating that he was asphyxiated during a struggle to subdue him. Although the court in *Simpson* utilized the standard for determining excessive force in *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. 1981), the standard in *Shillingford* is more stringent than that pronounced in *Graham, supra,* therefore, the court's decision would be the same under the *Graham* analysis. The court, in *Simpson*, found that, in viewing the record in the light most favorable to the plaintiffs, that the officers who entered

Simpson's cell reasonably should have known that in subduing and searching Simpson they maliciously used force which was grossly disproportionate to the need and was calculated to injure Simpson severely. The plaintiff satisfied a much greater burden in *Simpson* under *Shillingford* than a plaintiff faces under the *Graham* standard for determining excessive force. Clearly, *Simpson* conflicts with the instant case. Guidance from this Court is required to clarify a perplexing and confusing array of lower court decisions.

III. This Court should grant certiorari because the Fifth Circuit's extra-jurisdictional consideration of the interlocutory appeal based on qualified immunity squarely conflicts with *Johnson v. Jones*, 515 U.S. 304 (1995), which holds that a defendant may not appeal a district court summary judgment order denying qualified immunity insofar as that order determines whether or not the pre-trial record sets forth a genuine issue of fact for trial.

This Court has explicitly distinguished between the interlocutory appealability of orders that resolve legal wrangles

and those that determine evidence sufficiency. Evidence sufficiency disputes are not appealable. *Johnson v. Jones*, 515 U.S. 304 (1995). Specifically, "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court summary judgment order insofar as that order determines whether or not the pre-trial record sets forth a 'genuine issue of fact for trial'." 515 U.S. at 314.

In *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834 (1996), the Court clarified that "every" denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, and *Johnson* does not mean that every denial of summary judgment is non-appealable. 516 U.S. at _____, 116 S.Ct. at 842. However, "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that a particular conduct occurred, the question decided is not truly 'separable' from the

plaintiff's claim, and hence, there is no 'final decision' . . ." *Id.* This is the issue presented to this Court.

All that *Behrens, supra*, really added to the case law was an authorization for an appellate court to sift through the record to see if a defendant is entitled to qualified immunity, even if accepting is true, all of the properly admitted evidence favorable to the plaintiff in those cases where the trial court does not make clear the factual basis supporting its opinion. This is completely different from authorizing the appellate court to evaluate or weigh the merits of the items of evidence. The only issue that a defendant can properly raise on interlocutory appeal is the legal correctness and the standard that the trial court applied to its conduct.

Johnson and *Behrens* refer only to the limited review required to decide the distinct legal question of whether the conduct alleged by the plaintiff violated then clearly established

law.

As set forth in the dissent authored by Judge DeMoss, in *Colston v. Barnhart*, 146 F.3d 282, 286 (5th Cir. 1998) (on application for rehr'g en banc) (DeMoss, J., dissenting), "an increasingly complex panorama of doctrine and dissent . . . have evolved as the courts of appeal have struggled to reconcile the holdings of *Johnson* and *Behrens*." The Courts of Appeal are in complete disarray in applying *Johnson* and *Behrens*, and there is no consistency either within circuits or between the circuits in the application of these cases. Most notable in demonstrating a lack of consensus are the Fifth Circuit's eight to eight vote in *Colston, supra,* and the Fourth Circuit's seven to five vote in *Elliott v. Leavitt*, 105 F.3d 174 (4th Cir. 1997). *See,* Motz dissent at 179. The lack of consistency is apparent throughout the circuits. There appears to be little rhyme or reason to the conflicting determinations of whether to exercise appellate jurisdiction over

interlocutory appeals based on qualified immunity. In many cases, including the above two hotly disputed cases, the appellate court has exercised jurisdiction. *See also, Lee v. Sandberg*, 136 F.3d 194 (2nd Cir. 1997) (finding jurisdiction despite trial court's conclusion that a jury could find that the state trooper's actions in arresting Mr. Lee were objectively unreasonable); *Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997) (although district court found that genuine issues of material fact precluded summary judgment, jurisdiction exercised where court accepted plaintiff's version of events as true).

In other cases, appellate courts have found that they lack jurisdiction. *See, Carter v. Rhode Island*, 68 F.3d 9, 12 (1st Cir. 1995) (issue of whether supervisor had discriminatory intent was fact question, precluding summary judgment); *Tange v. State of R.I. Dept. of Elderly Affairs*, 120 F.3d 325, 326 (1st Cir. 1997) (events alleged and inferences as to defendants' intent were the

very type of factual disputes that *Johnson* held to be premature so far as appellate review is concerned); *Marshall v. Sullivan*, 105 F.3d 47, 54 (2nd Cir. 1996) (question as to what was told to officer, affecting what knowledge the officer possessed, constituted factual question precluding immediate appellate review); *Maylor v. State of Louisiana Dept. of Corrections*, 123 F.3d 855 (5th Cir. 1997) (order not suited for immediate interlocutory appeal where qualified immunity was denied because of insufficiently developed record); *McLoud v. Testa*, 97 F.3d 1536 (6th Cir. 1996) (factual questions relating to the actor's intent precluded immediate appellate jurisdiction); *Clash v. Beatty*, 77 F.3d 1045 (7th Cir. 1996) (evidentiary dispute of whether it was objectively reasonable for police officer to shove suspect into car, barred immediate appeal)

Clearly, decisions on appellate jurisdiction over interlocutory appeals based upon qualified immunity reflect no

consistency or reliable pattern. For example, the Fourth and Fifth Circuits appear internally divided nearly equally as is reflected by the seven to five vote in *Elliott* and the eight to eight vote in *Colston*. Other conflicts exist between and within the circuits as set out more fully above. Further guidance is necessary from this court in order to avoid the quagmire which is emerging in appellate jurisdiction under the present *Johnson* and *Behrens* framework.

IV. This Court should exercise its supervisory power and grant certiorari because the Fifth Circuit's decision is a significant departure from the accepted and usual course of judicial proceedings in that the Fifth Circuit opinion effectively makes every denial a qualified immunity immediately appealable, in violation of the limited interlocutory review permitted by *Johnson, supra,* and *Behrens, supra.*

The Fifth Circuit has determined that although questions of evidence sufficiency may not be examined on interlocutory appeal, it does have jurisdiction to examine the materiality of the evidence at issue. This is a distinction without a difference and is

in direct conflict with this Court's teaching in *Johnson*. This decision based on the Firth Circuit decision in *Colston, supra,* to allow interlocutory appellate review of a district court's determination, that issues of fact in question are material, would simply mean that every single denial of summary judgment is appealable because every single denial of summary judgment embodies a determination that the issues of fact in question are material. As stated by Judge DeMoss in his *Colston* dissent, " . . . if the issues of fact were not material, summary judgment would have been granted, not denied." *Colston*, 146 F.3d at 294 (DeMoss, J., dissenting.) As this Court pointed out in *Johnson*:

> An interlocutory appeal can make it more difficult for trial judges to do their basic job -- supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional and unnecessary appellate court work, either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

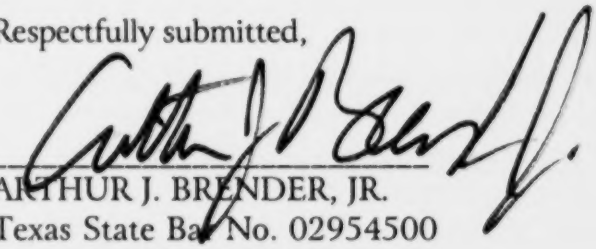
115 S.Ct. at 2154.

By making the materiality decision appealable in every single instance, the Fifth Circuit has opened up each and every case to the evils set out in *Johnson*.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court to issue a Writ of Certiorari, to review the decision of the Court of Appeals to the Fifth Circuit.

Respectfully submitted,



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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1998

FRANCISCA CASTILLO, GILBERT CASTILLO, as Administrator of the Estate of JESUS CASTILLO,
Deceased,
Petitioners,

vs.

CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) and OFFICER SAMMY LEDESMA (#4112),
Respondents.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Federal Rules of Civil Procedure, Rule 56(c)

(c) Motion and Proceedings Thereon. . . . The Judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . .

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50163

FRANCISCA CASTILLO; OLIVIA LOPEZ; JOHN CASTILLO; MARY CARLEEN; FRANCIS DELGADO; LUIZ CASTILLO; GILBERT CASTILLO; RAYMOND CASTILLO; RUSSELL CASTILLO; JOE CASTILLO; PETE CASTILLO; PAT SALAZAR; VICKI SHAW

Plaintiffs - Counter Defendants - Appellees

v.

CITY OF ROUND ROCK, TEXAS; MICHAEL H KINCAIDE, Officer,(4101); THOMAS C JACOBS, Corporal; SAMMY LEDESMA, Officer,(4112)

Defendants - Counter Claimants - Appellants

Appeal from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, JONES, and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

\s\
United States Circuit Judge

REHG-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50163

FRANCISCA CASTILLO; OLIVIA LOPEZ; JOHN CASTILLO; MARY CARLEEN; FRANCIS DELGADO; LUIZ CASTILLO; GILBERT CASTILLO;RAYMOND CASTILLO; RUSSELL CASTILLO; JOE CASTILLO; PETE CASTILLO; PAT SALAZAR; VICKI SHAW

Plaintiffs - Counter Defendants - Appellees

versus

CITY OF ROUND ROCK, TEXAS; MICHAEL H KINCAIDE, Officer,(4101); THOMAS C. JACOBS, Corporal; SAMMY LEDESMA, Officer, (4112)

Defendants - Counter Claimants - Appellants

- - - - - - - - - -

Appeal from the United States District Court for the Western District of Texas, Austin
(A-96-CV-863)

- - - - - - - - - -

Before HIGGINBOTHAM, JONES, and WIENER, Circuit Judges. Per Curiam:*

This civil rights case brought by the survivors of Jesus Castillo (collectively, the Castillos) against the City of Round Rock, Texas and three of its police officers (collectively, the Defendants), alleging that three of the City's law enforcement officers used excessive force in seizing Castillo and were deliberately indifferent to his ensuing medical needs, implicates 42 U.S.C. § 1983, the Texas Wrongful Death Act, the Texas Survivor Statute, the Texas Tort Claims Act, and Common Law tort law.- In response to motions for summary judgment filed by the Defendants on grounds of qualified immunity, the district court denied dismissal, concluding that genuine issues of material fact precluded such a disposition of the case. Even when we view the summary judgment evidence in the light most favorable to the Castillos, we are convinced that the actions of the City's police officers were objectively reasonable under the circumstances and were taken in good faith, within the scope of their authority, thereby entitling the Defendants to summary judgments of dismissal as to all claims asserted against them.

I.

Facts Most Favorable to the Castillos

Late one cold January afternoon, the Round Rock

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Police Department began receiving 911 reports that a

pedestrian was yelling and interfering with traffic at the intersection of Highway 620 and Interstate Highway 35. Dispatchers relayed the information to Officers Kincaide and Ledesma, who responded in their separate patrol cars. As they were proceeding to the scene, the officers were further advised by a police dispatcher that a man fitting the same description was reported to be stealing popcorn and beer from a Texaco station at that location. The subject of the reports turned out to be Castillo, a relatively short and heavy, 39 year old Hispanic male with a history of mental illness.[1]

Officer Kincaide was the first to arrive, spotting Castillo In the drive-through lanes of an adjacent bank, lightly clad despite the near-freezing temperature. Officer Kincaide ordered Castillo to stop where he was, and Castillo complied, placing a pack of beer on the ground, taking a drink from the bottle of beer he held in his hand, and then raising both hands while he continued to hold the beer bottle in one hand. Kincaide approached Castillo and "attacked high knocking the beer bottle out of his hand. Officer Kincaide and Castillo fought, struggling vigorously on the ground, as Kincaide attempted to subdue Castillo and citizen bystanders tried to aid in that effort. Castillo bloodied Officer Kincaide's nose in the fracas, and it bled profusely.

Officer Ledesma arrived and assisted Officer Kincaide, together with citizen bystanders, in restraining Castillo in the prone position on the ground, eventually handcuffing his hands

[1]The Castillos allege that Castillo and Officer Kincaide had been schoolmates but the record does not reflect that the officer recognized Castillo or was aware of his mental condition.

behind his back. Corporal Jacobs arrived after Castillo was handcuffed but while he was still kicking and yelling. Officer Kincaide and a male bystander climbed atop Castillo as the three officers put flex cuffs on Castillo's legs. All told, Officer Kincaide and the Good Samaritan remained on Castillo's back for four to six minutes. During the struggle, Officer Kincaide shoved his knee in the back of Castillo's neck and kept it in there for some five to ten minutes. At one point, Castillo exclaimed in Spanish that he was going to die. Noticing that Officer Kincaide war bleeding, Corporal Jacobs radioed the dispatcher to send an ambulance to the scene.

When, after being- handcuffed and leg-shackled, Castillo finally stopped struggling, the officers rolled him over onto his back. When they did, the officers noticed that Castillo's face had turned blue and that he appeared to be unconscious. The ambulance arrived shortly and took Castillo to a nearby hospital where he died approximately a week later without having regained consciousness. Castillo's tragic death was caused by anoxic encephalopathy that produced cardiorespiratory arrest during the positional asphyxia that resulted from his being laid on the ground, handcuffed and in the prone position, for four to six minutes with the weight of two adults on his back.[2]

The Castillos filed state wrongful death and survival claims, and a federal civil rights claim under 42 U.S.C. § 1983, against the Defendants. The Castillos alleged violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United

[2]Castillo suffered from health problems that included obesity and an enlarged heart, which might have contributed to his death.

States Constitution. They also asserted a negligence claim against the City of Round Rock and both statutory and common law tort claims against Kincaide, Ledesma, and Jacobs, in their individual and official capacities.

The parties agreed to proceed before a magistrate judge. The Defendants filed motions for summary judgment, which the magistrate judge granted as to the Fifth and Eighth Amendment claims but denied as to the Fourth and Fourteenth Amendment claims and as to the state law claims as well. The Defendants timely filed notices of appeal from the court's interlocutory refusal to dismiss all claims on grounds of qualified or official immunity.

II.

Analysis

We conclude that we have jurisdiction to review this case. We recently clarified our approach to the arcane issues whether and under what circumstances we can review a district court's interlocutory denial of qualified immunity. In Colston v. Barnhart,[3] we stated that:

> when a district court denies a motion for summary judgment on the ground that "genuine issues of material fact remain, n the court has made two distinct legal conclusions. First, the court has concluded that the issues of fact in question are

[3]146 F.3d 282 (5th Cir.)(order denying rehearing en banc), cert. denied, 119 S. Ct. 618 (1998).

> genuine, i.e., the evidence is sufficient to permit a reasonable fact finder to return a verdict for the nonmoving party. Second, the court has concluded that the issues of fact are material, i.e., resolution of the issues might affect the outcome of the suit under governing law.[4]

Thus, an appellate court may not review a district court's determination that disputed issues of fact are genuine, but may g review the question of materiality.[5] The Defendants maintain that when we accept as true that Castillo raised his hands to surrender peacefully and accept the Castillos' version of how the police officers' actions led to Castillo's death, we have jurisdiction to consider whether the lower court erred in not granting summary judgment. In essence, the Defendants argue that the disputed facts do not affect whether qualified immunity applies; rather that, even assuming the truth of the Castillos' version of the facts, the Defendants have not violated Castillo's constitutional rights. As such, any genuine dispute about the facts is not material. We agree that, under such an approach, we have appellate jurisdiction.

Claims of excessive or deadly force arise under the Fourth

[4] Id. at 284 (citation omitted).

[5] See Id.

Amendment.[6] The "reasonableness" standard requires a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."[7] The reasonableness determination involves a fact-intensive analysis of the case, including consideration of "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrests to determine whether the force used was excessive.[8]

When, in our de novo review, we consider the otherwise disputed facts in the light most favorable to the Castillos, we are convinced beyond peradventure that the officers did not use excessive force or deliberately disregard Castillo's medical needs. Neither side disputes that Castillo raised the beer bottle in the air in response to the officer's commands. Regardless of Castillo's subjective intent in doing so, it is not unreasonable to assume that, given the totality of the circumstances, Officer Kincaide could have perceived Castillo's action as threatening. More particularly, as the threat thus perceived includes the perception of

[6]See Graham v. Connor, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force -- deadly or not -- in the course of an arrest, investigatory stop, or other single 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard....").

[7]Graham, 490 U.S. at 396 (citations and internal quotations omitted).

[8]Id.

the beer bottle as a dangerous weapon, a pre-emptive strike by the officer to disarm the perceived adversary imparts no culpability to the officer, even if his action is found (or assumed) to be the immediate producing cause of the ensuing altercation.

In any event, in the struggle that followed, Castillo refused to submit, actively resisting by kicking and yelling - and bloodying the officer's nose - in a manner that a reasonable officer could perceive as hostile. That Castillo's struggle might eventually have become a panic reaction to his positional asphyxia changes neither its perception to reasonable officers as hostility and resistance to arrest nor the fact that it clearly began as hostile resistance to lawful and reasonable demands of the police. We are satisfied that the officers were not unreasonable in placing Castillo in a prone position and incapacitating him as quickly and professionally as possible, by climbing on top of his back and securing his hands and legs, so as to protect themselves and bystanders from a large and powerful man who was clearly out of control and refusing to submit to the officers' commands.

In the recent and eerily similar Seventh Circuit case of Estate of Phillips v. City of Milwaukee,[9] an obese, mentally ill man who was hostile to police died from positional asphyxia after being held in the prone position while being handcuffed. The court determined that the officers' actions constituted a reasonable response to the situation that they faced - a hostile

[9]123 F.3d 586 (7th Cir. 1997), cert. denied, 118 S. Ct. 1052 (1998).

suspect who refused to be restrained.[10] The Phillips court found no constitutional violation and did not reach the issue of qualified immunity.[11]

"Authorities must be allowed 'to graduate their response to the demands of any particular situation.'"[12] "Restraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest."[13]

Our review of the applicable law and the operable facts resolving all disputes in favor of the Castillos convinces us that the situation faced by the officers in their encounter with Castillo justified the degree of force exerted under the circumstances and was not unreasonable, either quantitatively or qualitatively. Neither can it be said that the officers had disregard, deliberate or otherwise, for Castillo's health needs. As soon as his distress was recognized he was placed in the ambulance and rushed to the hospital. The procedures used were well within police norms, both the tome and the extent of the force were reasonable if not minimal; and the abandonment of force and commencement of

[10]See Id. at 593.

[11]See Id. at 597.

[12]United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985) (quoting United States v. Place, 462 U.S. 696, 709 n.10 (1983)).

[13]Estate of Phillips, 123 F.3d at 593.

concern for the health of the person restrained were timely and appropriate. Under the circumstances, there was no constitutional violation and thus no legal support for the claims advanced by the plaintiffs. Consequently, the rulings of the district court denying dismissal must be reversed and judgment rendered in favor of the Defendants, dismissing all claims against them.[14]

REVERSED and RENDERED.

[14]The Texas law of "official immunity is essentially identical to the federal law of qualified immunity, sparing government officials from litigation on matters arising from or connected with the discharge of discretionary duties, as long as the officials act in good faith and within the scope of their authority, City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994). As the defendant officers were clearly discharging discretionary duties within the scope of their authority, and as the same facts that demonstrate objective reasonableness for federal purposes demonstrate good faith for state purposes, see City of Lancaster, 883 S.W.2d at 656-57 (holding that a reasonably prudent officer acting under the same or similar circumstances could have believed that the force used was necessary, is acting in good faith), the defendant officers here are entitled to official immunity.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCISCA CASTILLO,	§	
ET AL.,	§	
	§	
VS.	§	
	§	No. A-96-CA-863-ADA
CITY OF ROUND ROCK,	§	
TEXAS, ET AL.	§	

ORDER

Before the Court is the Motion of Defendants City of Round Rock, Officer Michael H. Kincaide, Officer Sammy Ledesma, and Corporal Thomas C. Jacobs, in their individual and official capacities, for Summary Judgment with regard to the Plaintiffs' federal law claims filed on November 14, 1997 (Clerk's Docket No. 42). The Defendants also filed a Motion for Summary Judgment with regard to Plaintiffs' State law claims on the same date (Clerk's Docket No. 43). The Plaintiffs filed their Response to these Motions on December 8, 1997. The Court conducted an oral hearing on January 15, 1998.

GENERAL BACKGROUND

Plaintiff Francisca Castillo, the sole surviving parent of Jesus Castillo ("Decedent" or "Mr. Castillo"), brings this cause of action for wrongful death under the Texas Wrongful Death Act, § 71.001, et seq., Tex. Civ. Prac. & Rem. Code, and as a civil rights cause of action pursuant to 42 U.S.C. § 1983. Plaintiff Gilbert

Castillo, the Administrator of Decedent's estate, brings a survival cause of action pursuant to the Texas Survival Statute, § 71.021, Tex. Civ. Prac. & Rem. Code, and as a civil rights cause of action pursuant to 42 U.S.C. § 1983. The Plaintiffs allege Defendants violated Decedent's constitutional rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and assert a negligence claim against the City under the Texas Tort Claims Act and common law tort claims against Defendants Kincaide, Ledesma, and Jacobs.

At the time of his death Jesus Castillo was an obese 39 year-old Hispanic male who suffered from a history of mental illness. On January 5, 1995, sometime around 4:30 p.m., dispatchers for the Round Rock Police Department began receiving citizen reports over its 911 system concerning a Hispanic male pedestrian (later to be identified as Jesus Castillo) who was reported to have been yelling and interfering with traffic at the intersection of Highway 620 and Interstate Highway 35 in Round Rock, Texas. City of Round Rock Patrol Officers Sammy Ledesma and Mike Kincaide responded to the 911 calls. As the officers drove to the scene, they received another 911 call pertaining to Jesus Castillo which reported that he had just stolen a 12-pack of bottled beer and some popcorn from a Texaco station. As Officer Kincaide arrived at the scene, Castillo was holding an open beer bottle in one hand and the twelve pack in his other hand. At this point the Parties dispute what happened next.

The Plaintiffs contend that after "being told to stop where he was, Mr. Castillo put his hands up in a surrender like fashion. Nevertheless, Officer Kincaide approached Mr. Castillo and knocked the beer out of his hand." The Defendants contend that

the altercation began when Castillo attacked him. Whatever the impetus, a physical altercation ensued which resulted in a struggle between the two men on the ground. The Plaintiffs contend that Officer Kincaide climbed on top of Castillo, as did a male bystander, and both stayed on top of Castillo for four to six minutes. Plaintiffs further contend that Officer Kincaide shoved his knee into Castillo's neck area and kept it in that position for the duration of the fight (5-10 minutes). Others became involved in the fray, and eventually Officers Ledesma and Jacobs arrived at the scene. The Plaintiffs contend that during the struggle, Castillo exclaimed in Spanish that he was going to die. The Defendants contend that when Corporal Jacobs arrived at the scene he observed Kincaide and Ledesma struggling to get Castillo under control even though his hands were already cuffed. The Defendants contend that Officers Jacobs, Kincaide, and Ledesma decided to put flex cuffs on Castillo's legs because he continued to struggle and kick.

During this incident, Corporal Jacobs noticed that Officer Kincaide was bleeding and radioed the dispatcher to send an ambulance to the scene. At some point, Castillo stopped struggling and the officers rolled him over and noticed that his face was blue and that he was unconscious. Castillo never regained consciousness. Castillo was taken to the hospital where he remained in a coma for approximately one week before he was removed from life support.

The Plaintiffs allege that Castillo's death was caused by positional asphyxia during his arrest. Plaintiffs rely heavily on the Chief Medical Examiner of Travis County's report. After performing an autopsy on the body of Jesus Castillo, the Chief Medical Examiner, Dr. Roberto J. Bayardo, concluded that

Castillo's death was caused by anoxic encephalopathy due to cardio respiratory arrest due to positional asphyxia. Dr. Bayardo concluded that the positional asphyxia which was caused by being laid, handcuffed in the prone position for at least four to six minutes with weight placed on his back. The Plaintiffs contend that the Defendants used excessive force during the arrest and were deliberately indifferent to Castillo's medical needs.

DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

I. Federal Claims

Defendants argue that they are entitled to summary judgment on Plaintiffs' federal claims because (1) the Fifth Amendment applies only to federal actors; (2) the Eighth Amendment does not apply to arrestees or pretrial detainees; (3) the Plaintiffs have not shown that the officers used excessive force in violation of the Fourth Amendment; (4) the Plaintiffs have not shown that the officers were deliberately indifferent to the decedents medical needs; and (5) the Individual Defendants are entitled to qualified immunity.

II. State Law Claims

Defendants contend that they are entitled to summary judgment on Plaintiffs' state claims for the following reasons: (1) Plaintiffs' official capacity claims and claims against the City are barred by governmental immunity; (2) the Individual Defendants are immune from suit on the individual capacity claims since the City is immune; (3) the claims against the Individual Defendants are barred by official immunity and, therefore, the claims against the City are barred by sovereign immunity.

ANALYSIS

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate under Rule 56© of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The party seeking summary judgment bears the burden of showing that there is an absence of evidence to support the non-movant's case. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553-54 (1986); *Coleman v. Houston Independent School District*, 113 F.3d 528, 533 (5th Cir. 1997). After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986).

The Court views facts in the light most favorable to the non-movant and draws all reasonable inferences in her favor. *Coleman*, 113 F.3d at 533. If the non-movant sets forth specific facts in support of allegations essential to her claim, a genuine issue of material fact is presented, and summary judgment is inappropriate. Unsupported alleviations or affidavit or deposition testimony setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a proper motion for summary judgment. *Duffy v. Leading Edge Products, Inc.* 44 F.3d 308, 312 (5th Cir. 1995)(citing *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. at 2509-10)). Rather, the nonmoving party must set forth specific facts showing the existence of a "genuine" issue

concerning every essential component of its case. *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 777 (5th Cir. 1997). The standard of review "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir. 1990)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356 (1986)). Applying these standards, the Court turns to the merits of the motion for summary judgment.

II. FEDERAL CLAIMS

A. The Fifth Amendment Claim

Plaintiffs' allege that the Defendants' actions violated the due process clause of the Fifth Amendment. Because the due process component of the Fifth Amendment applies only to federal actors, Plaintiffs have failed to state a claim against the City and the officers in this case. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 n. 3 (5th Cir. 1995); *Duggan v. City of League Texas*, 975 F. Supp. 968, 971 (S.D. Tex. 1997). Accordingly, the Court GRANTS the Motion for Summary Judgment with regard to the Fifth Amendment claim.

B. The Eighth Amendment Claim

Plaintiffs also allege that the Defendants violated the decedent's Eighth Amendment rights to be free from cruel and unusual punishment. The Eighth Amendment, however, applies to convicted prisoners, not to pretrial detainees or arrestees. *Hare v. City of Corinth, MS*, 74 F.3d 633, 639 (5th Cir. 1996). In *Hare*, the Fifth Circuit reasoned:

> Pretrial detainees and convicted prisoners, however, look to different constitutional provisions for their respective rights to basic needs such as medical care and safety. The constitutional rights of a convicted state prisoner spring from the Eighth Amendment's prohibition on cruel and unusual punishment [citation omitted], and, with a relatively limited reach, from substantive due process. The constitutional rights of a pretrial detainee, on the other hand, flow from both the procedural and substantive due process guarantees of the Fourteenth Amendment.

74 F.3d at 639.

Because the Decedent was not a convicted prisoner at the time of his death, the Plaintiffs have failed to state an Eighth Amendment claim against the Defendants. Accordingly, the Defendants' Motion for Summary Judgement in regard to the Eighth Amendment claim is GRANTED.[1]

C. Fourth and Fourteenth Amendment Claims

Plaintiffs contend that the Defendants used excessive force in carrying out the arrest of Jesus Castillo in violation of the

[1]The Court will construe the Plaintiffs' Eighth Amendment claim as a denial of medical care claim under the Fourteenth Amendment's due process analysis. The Court will address this claim below.

Fourth Amendment. Plaintiffs also contend that the Defendants failed to provide medical care to the Deeedent. Defendants argue that the force used was reasonable and was not excessive. Defendants also argue that the Individual Defendants are entitled to qualified immunity.

1. Qualified Immunity

Qualified immunity shields government officials, including police officers, who are performing discretionary functions from civil damage liability if their action were objectively reasonable in light of clearly established law. *Colston v. Barnhart*, 130 F.3d 96, 99 (5th Cir. 1997). The evaluation of a qualified immunity claim involves a two-step process. *Id.* (citing *Harper v. Harris County*, 21 F.3d 597, 600 (5th Cir. 1994)). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. *Colston*, 130 F.3d at 99. The Court finds that the Plaintiffs have met this burden. The use of excessive force to apprehend a subject implicates the Fourth Amendment's guarantee against unreasonable seizures. *Id.* Additionally, a police officer's denial of medical care to an individual in custody implicates the due process clause of the Fourteenth Amendment. *City of Corinth*, 74 F.3d at 639.

The second step requires the Court to determine whether the Individual Defendants' conduct was objectively reasonable. Even if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was "objectively reasonable." *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993). In *Graham v. Connor*, 109 S.Ct. 1865, 1871 (1989), the Supreme Court explained that the reasonableness inquiry in an excessive force case is an objective one; in evaluating the officer's conduct under the Fourth Amendment, a court is to balance the

amount of force used against the need for that force with reference to clearly established law at the time of the conduct in question. If, after reviewing the evidence in the light most favorable to the non-movant, reasonable public officials could differ on the lawfulness of the defendant's actions, then the defendant is entitled to qualified immunity. *Anderson v. Creighton*, 107 S.Ct. 3034, 3038 (1987). Courts also recognize that in determining the reasonableness of a police officer's conduct, they are not to employ the "20/20 vision of hindsight," *Graham*, 490 U.S. at 396, 109 S.Ct. at 1872. Rather, courts are to recognize that police officers are required to make split-second decisions in circumstances that are "tense, uncertain, and rapidly evolving" about the amount of force that is necessary in a particular situation. *Id.*

We now turn to the issue of whether the Individual Defendants acted objectively reasonable in carrying our the arrest of Mr. Castillo. The Plaintiffs allege that the Decedent did not provoke the altercation, that the police officers forced him to the ground and placed him and held him in a prone position that led to his ultimate death from positional asphyxiation. The Parties sharply dispute the facts that surround the Decedent's arrest. Although the Decedent did not have a gun or knife, it is disputed whether the Decedent used the beer bottle in a threatening manner. It is also disputed the extent to which the Decedent resisted the arrest as well as the length of time that he resisted the officer's efforts to restrain him. The Parties differ as to how long Mr. Castillo was held in a prone position. The Plaintiffs contend that before Mr. Castillo became unconscious he notified the officers that he was in extreme pain and was "going to die." The Plaintiffs contend that the Officers should have realized that the Decedent had stopped moving and was no longer a threat before

he became unconscious. Thus, the Plaintiffs contend that the officers were deliberately indifferent to Mr. Castillo's medical needs during the incident.

The numerous material fact issues precludes the determination of whether the officer's conduct was objectively reasonable. Accordingly, the Defendants' Motion for Summary Judgment on the issue of qualified immunity is DENIED.

2. Claims Against the City and Individual Defendants in their Official Capacity

The Supreme Court has held that "all claims that law enforcement officers have used excessive force. . .in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonable standard. . ." *Graham v. Connor*, 109 S.Ct. 1865,1871(1989). "[T]he reasonableness inquiry in an excessive force claim is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 1872.

It is clearly established law in the Fifth Circuit that in order to state a claim for excessive force in violation of the Constitution, a plaintiff must allege (1) an injury (2) which resulted directly and only from the use of force that was clearly excessive to the need, and (3) the excessiveness of which was objectively unreasonable. *Ikard v. Blair,* 101 F.3d 430, 433-34 (5th Cir. 1996)(citing *Spann*, 987 F.2d at 1115). In gauging the objective reasonableness of the force used by a law enforcement officer, we must balance the amount of force used against the

need for that force. *Id.*

In the case at bar, there is no dispute that Mr. Castillo suffered an injury which resulted from the use of force. Thus, the only question is whether the Defendants' use of force was "objectively reasonable" in light of the facts and circumstances confronting the officers, without regard to their underlying intent or motivation. *Stroik v. Ponseti,* 35 F.3d 155, 158 (5th Cir. 1994), cert. denied, 115 S.Ct. 1692 (1995). As the Court's discussion of qualified immunity made clear, the Court finds that there are material fact issues which preclude it from determining whether the Defendants' actions were "objectively reasonable." Accordingly the Court DENIES the Motion for Summary Judgment in regard to the Fourth and Fourteenth Amendment claims.

In *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 472-73 (5th Cir. 1996), the Fifth Circuit held that an arrestee's complaint for denial of substantive due process and a pretrial detainee's complaint for denial of substantive due process are evaluated under the same standards. The Fifth Circuit found that an arrestee's right to medical attention, like that of a pretrial detainee, derives from the Fourteenth Amendment. *Id.*

The Fifth Circuit has held that a state official's episodic act or omission violates a pretrial detainee's due process right to medical care if the official acts with subjective deliberate indifference to the detainee's rights. *Hare v. City of Corinth*, 74 F.3d 633, 647 (5th Cir. 1996).

The *Hare* Court defined subjective deliberate indifference as subjective knowledge of a substantial risk of serious medical

harm, followed by a response of deliberate indifference. *Id.* The Court finds that there are material fact issues in regard to whether the officers acted with deliberate indifference to Mr. Castillo's medical needs. Accordingly, Defendants' Motion for Summary Judgment in regard to this claim is DENIED because material fact issues remain.[2]

II. STATE LAW CLAIMED

A. Governmental Immunity

A municipality, as a political subdivision of the state, is not liable for the acts or conduct of its officers or employees unless the municipality's common law immunity is waived by the Texas Tort Claims Act. ("TTCA"). TEX. CIV. PRAC. & REM. CODE ANN. § 101.001101.109 (Vernon 1997); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994). The applicable waiver provision of the TTCA provides, in pertinent part:

> A governmental unit of the state is liable for:
>
> (2) personal injury or death so caused by a condition or use

[2]Inexplicably, the Defendants did not argue that the Plaintiffs have failed to identify a municipal "policy" or "custom" that caused the Plaintiffs' injuries. Accordingly, the Court will not address this issue at this time.

of tangible personal or real property[3] if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (Vernon 1997).

Section 101.062(b) of the TTCA gives a public agency immunity from suit for an employee's actions in connection with 9-1-1 claims, unless the action "violates a statute or ordinance applicable to the action." *City of Galveston v. Whitman*, 919 S.W.2d 929, 931 (Tex. App.--Houston [14th Dist.] 1996, writ denied). The Plaintiffs have alleged that the Individual Defendants' actions violated sections 19.05[4] and 22.01[5] of the Texas Penal Code. The Court finds that there are material fact issues as to whether the Defendants are entitled to immunity under § 101.062(b). Accordingly, Defendants' Motion for Summary Judgment on the governmental immunity issue is HEREBY DENIED.

B. Official Immunity

[3]Defendants concede for the purposes of this summary judgment motion that the handcuffs and leg straps used by the officers qualify as "personal property."

[4]Section 19.05(a) provides that "[a] person commits an offense if he causes the death of an individual by criminal negligence."

[5]Section 22.01 provides that "[a] person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse"

The Texas law of official immunity is substantially the same as federal qualified immunity law. *Wren v. Lowe*, 130 F.3d 1154, 1160 (5th Cir. 1997). Under Texas law, "[g]overnment employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *Tamez v. City of San Marcos, Texas*, 118 F.3d 1085, 1097 (5th Cir.1997), *petition for cert. filed,* (U.S. Dec. 15, 1997)(No. 97-7145),(quoting *City of Lancaster v. Chambers,* 883 S.W.2d 650, 653 (Tex. 1994)).

The Plaintiffs do not contest that the Individual Defendants were acting within the scope of their authority or that their actions were discretionary. Thus, the issue is whether the Defendants' summary judgment evidence conclusively establishes the "good faith" element of the official immunity defense. In order to establish that the officers acted in "good faith," they must show that a reasonably prudent officer might have believed that the force used was necessary. *City of Lancaster,* 883 S.W.2d at 656; *Hudson v. Vasquez*, 941 S W. 2d 334. 337 (Tex. App.--Corpus Christi 1997, no writ), *Victory v. Bills*, 897 S.W.2d 506, 509 (Tex. App.--El Paso 1995, no writ). As already discussed in this opinion in regard to qualified immunity, the Court finds that there are genuine material fact issues on whether the officers acted in ' good faith" in the arrest of Jesus Castillo. Accordingly, Defendants' Motion for Summary Judgment on the issue of official immunity is HEREBY DENIED.

IV. SUMMARY

In summary, the Court **GRANTS** the Motion for

Summary Judgment **IN PART** and **DENIES** it **IN PART**. The Court **GRANTS** the Motion for Summary Judgment with regard to the Fifth and Eighth Amendment claims. However, the Court **DENIES** the Motion in regard to the Fourth and Fourteenth Amendment claims. The Court **FURTHER DENIES** Defendants' Motion for Summary Judgment on the state law claims.

SIGNED this the 2nd day of February, 1998, at Austin, Texas.

\s\
ALAN D ALBRIGHT
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCISCO CASTILLO	NO. A-96-CA-863-AA
VS.	MOTIONS HEARING
CITY OF ROUND ROCK, ET AL.	

Appearance:

For the Plaintiff:	Arthur Brender
For the Defendant:	Kevin Cole

Transcriber:	Chris Carpenter 200 W. 8th Street

Austin, Texas 78701
512-916-5564

The above styled and numbered cause came on for hearing before the Honorable Alan Albright, Judge presiding, on January 15, 1998, commencing at 2:00 in the afternoon, in courtroom number 4, United States Court House, Austin, Texas.

THE CLERK: The court calls case A-96-2 C -A 863, Francisca Castillo, versus the City of Round 3 Rock, et al, for a motions hearing.

MR. COLE: Kevin Cole here for the defendants, Your Honor.

MR. BRENDER: Arthur Brender for the Plaintiff, Your Honor.

THE COURT: Let's see what I've got here: A motion for summary judgment, responses, and motions to strike evidence.

. . .

(p.29)

were called and got out there.

But we know that according to the police report, Officer Kincaid, and although it's certainly in the record, we didn't make it a part of this, but Officer Kincaid has been disciplined by the Round Rock Police Department. He's driven over the legs of a suspect that he had.

MR. COLE: Objection, Your Honor. There is no evidence in the record regarding any of those matters.

MR. BRENDER: It's a part of his deposition, Your Honor. It is in the record.

13 THE COURT: I'll overrule the objection.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCISCA CASTILLO,	§	
GILBERT CASTILLO,	§	
as Administrator	§	
of the Estate of JESUS	§	
CASTILLO,	§	
Deceased,	§	
	§	
VS.	§	
	§	No. A-96-CA-863-JN
CITY OF ROUND ROCK,	§	
TEXAS, OFFICER MICHAEL H	§	
KINCAIDE, #4101),	§	
CORPORAL THOMAS C.	§	
JACOBS, (#1404) and	§	
OFFICER SAMMY LEDESMA	§	
(#4112)	§	

AFFIDAVIT OF MEDICAL EXAMINER

BEFORE ME, the undersigned authority, on this day personally appeared, Roberto J. Bayardo, M.D., being by me duly sworn, did upon his oath depose and state:

"My name is Roberto Bayardo, M.D. I am over 21 years of age, and am a resident of Travis County, Texas. I have never

been convicted of a felony. I am of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein as if set forth in its entirety is a true and correct copy of my curriculum vitae.

"I am a medical doctor currently employed as a Chief Medical Examiner of Travis County, Texas. I am board certified by the American Board of Pathology. My license is on file in Travis County, Texas. A copy of my education and professional background is attached hereto as Exhibit "A".

"On January 13, 1995, at the request of the Justice of the Peace, Precinct 3, Williamson County, Texas, sitting as a Court of Inquiry, I performed an autopsy on the body of Jesus Marcardo Castillo. I was then and am now of the opinion in the case of the death of Mr. Castillo was anoxic encephalopathy due to cardio respiratory arrest due to positional asphyxia. A copy of my autopsy report is attached hereto as Exhibit "B".

I have reviewed the witness statements of Jennifer Lee, Marlyn Hart, Mary Jo Collins, David Barrerra, Jr., Andres Leah, Jr., George Ashford, Jo Keeling, and Annette Becker taken by Round Rock Police Department as part of the investigation of the matters leading to the death of Mr. Castillo. Copies of those witness statements are attached hereto as Exhibit 3, and incorporated herein as if fully set forth in their entirety. I have also reviewed my autopsy report, the Round Rock Fire Department records, the Williamson County Mental Health and Mental Retardation Center, the Emergency Medical Services Records, and the reports prepared by the Round Rock Police Department officers, which are all documents customarily relied upon by medical professionals such as myself when providing expert medical opinions.

The witness statements of Annette Becker and Marlyn Hart reflect that Officer Kincaide and Marlyn Hart were on Mr.

Castillo's back for four to six minutes. The witness statements of David Barrera, Jr., Corporal Jacobs and Officer Kincaide reflects that Jesus Castillo stopped moving at some point during the struggle and that his face turned blue prior to being rolled over by Officer Kincaide. In my opinion, Mr. Castillo's bluish face and eventual cardiorespiratory arrest resulted from positional asphyxia which was caused by being laid, handcuffed in the prone position for at least four to six minutes with weight placed on his back. Mr Castillo had an enlarged heart which can be expected due to his size and weight which predated his arrest on January 5, 1995. I do not believe that an enlarged heart played any role in his death.

In my opinion, placing an obese man such as Mr. Castillo in the prone position while applying weight to his back presents a substantial risk of positional asphyxia. The risk of positional asphyxia is substantial if a weight or pressure is applied to such a person's back for a prolonged period of time while the person is

handcuffed in the prone position. I base this opinion on the fact that obese people have pressure on their diaphragm naturally, due to their large size, if placed in the prone position. If sufficient pressure is placed on a person's diaphragm, that person will naturally have a difficult time breathing. Handcuffing an obese person and applying pressure to their back, while in the prone position, poses an even greater risk due to the increased pressure on the diaphragm. The more weight that is applied to his back, the greater the risk that such a person would suffer oxygen deprivation and eventual death by asphyxia if the pressure is not relieved.

Based on the witness' accounts at least one adult and possibly others were on Mr. Castillo's back and after civilians and officer's were applying pressure on Mr. Castillo's back for at least four to six minutes. I believe that Officer Kincaide had adequate time to recognize Mr. Castillo's breathing difficulties. A person's

heart will not stop beating due to lack of oxygen unless they have gone without breathing for at least three to four minutes, even during a struggle. During that time, Officer Kincaide had adequate time, particularly after the arrival of the other officers, to investigate and determine Mr. Castillo's condition. Oxygen deprivation when handcuffed in a prone position will not only cut off oxygen, but cause the subject to struggle to get a breath, a scenario described by the various police officers and civilian witnesses. Placing an arrest subject in such a position with pressure applied to his back for as little as 4 to 6 minutes, coupled with additional struggle by the suspect, is a classic example of substantial risk of death or serious injury by positional asphyxia. It is apparent that Officer Kincaide did not attempt to investigate Mr. Castillo's medical condition or roll him over until after Mr. Castillo had gone into cardiorespiratory arrest.

FURTHER AFFIANT SAYETH NOT.

/ S /

ROBERT BAYARDO, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME on this the 3rd day of December, 1997, to certify which witness my hand and official seal.

/ S /

Notary Public, State of Texas

CURRICULUM VITAE

NAME: *ROBERTO J. BAYARDO, M.D.*

ADDRESS:
Office of the Medical Examiner of Travis County
P.O. Box 1748
Austin, Texas 78767
Telephone: (512) 473-9599

Home:
8201 Hickory Creek Dr.
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Telephone: (512) 327-4867

BORN: *October 22, 1934, Mexico*

LICENSURE:
Mexico, 1959
Texas, 1969
California, 1981

BOARD CERTIFICATION:
American Board of Pathology,
Anatomic and Clinical Pathology, 1969
Forensic Pathology, 1979

SPECIALIZATION: *Forensic Pathology*

PROFESSIONAL EXPERIENCE:
Chief Medical Examiner, Travis County, Austin, Texas
1978-Present

Deputy Chief Medical Examiner, Harris County , Houston, Texas
1977-1978

Assistant Medical Examiner, Harris County, Houston, Texas
1976-1977

Assistant Pathologist, The Methodist Hospital, Houston, Texas
1969-1976

General Surgeon, I.M.S.S. Hospital
Hermosillo, Sonora, Mexico
1961-1962

ACADEMIC APPOINTMENTS:

Clinical Associate Professor, Pathology
Texas A&M University, College Station,
1994-Present

Clinical Associate Professor, Pathology
The University of Texas, San Antonio,
1986-Present

Clinical Associate Professor, Pathology
Baylor College of Medicine,
Houston, Texas
1976-1978, 1990-Present

Assistant Professor of Pathology

Baylor College of Medicine,
Houston, Texas
1969-1976

POSTGRADUATE TRAINING:

Postdoctoral Fellow in Pathology,
Baylor College of Medicine,
Houston, Texas
1968-1969

Chief Resident in Pathology,
Methodist Hospital of Dallas,
Dallas, Texas
1967-1968

Resident and Chief Resident in Pathology, Good Samaritan Hospital, Phoenix, Arizona 1963-1967

Intern, Rotating, St. Mary's Hospital, Pima County Hospital, Tuscon, Arizona
1962-1963

Resident in Surgery, General Hospital, Hermosillo, Sonora, Mexico
1957-1958

Intern, Rotating, Civil Hospital, Guadalajara, Jalisco, Mexico
1956-1957

EDUCATION: *Graduate: University of Guadalajara*

Mexico, M.D., 1959

Undergraduate: University of Guadalajara, Mexico, B.S. Valedictorian, 1952

HOSPITAL APPOINTMENTS:

Brackenridge Hospital, Pathology, Austin
HCA South Austin Medical Center, Austin

MEMBERSHIPS:

Travis County Medical Society
Texas Medical Association
Texas Society of Pathologists
(Chairman Medical Examiner Council)
American Medical Association
College of American Pathologists
American Society of Clinical Pathologists
National Association of Medical Examiners (Ex-member Board of Directors)
International Academy of Pathologists

ROBERTO J. BAYARDO, M.D.
Diplomate of American Board of Pathology
CHIEF MEDICAL EXAMINER

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MEDICAL EXAMINER'S REPORT

JESUS MACARIO CASTILLO
WILLIAMSON COUNTY, TEXAS
PA-95-0022

The post-mortem examination was performed by Roberto J. Bayardo, M.D., Chief Medical Examiner, beginning at 8:50 a.m., on 1-13-95, at the Travis County Morgue, Austin, Texas, under the written authorization of Jimmy Bitzt Justice of the Peace, Precinct 3, Williamson County, Texas, and in the presence of Investigator William Avila of the Round Rock Police Department.

EXTERNAL EXAMINATION:
The body was that of a well developed, obese, 39 year-old Hispanic man measuring 64 inches in length and weighing about 190 pounds. There was fixed rigor mortis and posterior dependent lividity. The head was symmetrical and covered with black hair

measuring up to 2 inches in length. Above the tail of the left eyebrow there was a healing 1/2 inch abrasion. The eyes were brown; the pupils round and equal and the sclerae were clear. The nose, lips and ears were intact. There was a mustache and a couple of days growth of beard. The mouth contained natural teeth in good condition. The neck was short and thick. The chest was proportionate and symmetrical. The abdomen was obese. There was a 2 inch umbilical hernia. There was a 6 inch appendectomy-type scar. Above the right groin there was a 2 inch linear scar. The external genitalia were those of an uncircumcised man with both testes present within the scrotum. The pubic hair was male in distribution. The lower extremities were symmetrically developed. Over the right knee there was a 1 1/2 inch healing abrasion. Over the left knee and upper leg there were multiple healing scratches. An I.D. bracelet was around the left ankle. The upper extremities were symmetrically developed. Over the right upper arm there was a resolving 1 1/4 inch bruise. Over the left antecubital fossa there was a 2 1/2 inch bruise. There were a few other scattered smaller bruises in the left forearm and left upper arm. Over the left abdominal flank there was a resolving 3 1/2 inch bruise. The back was intact. Over the left buttock there was a healing 1/4 inch abrasion.

INTERNAL EXAMINATION:

The usual Y-shaped incision was made. The skin and subcutaneous tissue at the level of the umbilicus measured 1 1/2 inches in thickness. The abdominal and thoracic musculature was unremarkable. The rib cage was intact. The pleural cavities were free of fluid and adhesions. The pericardial sac was intact and contained a few milliliters of clear serous fluid. The thoracic viscera were in their usual anatomic relationships. The leaves of the diaphragm were intact. The abdominal cavity was free of fluid

and adhesions. The abdominal viscera were in their usual anatomic relationships. The vermiform appendix was surgically absent.

HEART:
The heart was enlarged and it weighed 550 grams. The epicardium was smooth and glistening. The coronary arteries were normal in distribution and free of atherosclerosis. The myocardium was redbrown and flabby with dilatation of the cavities of both ventricles. There was neither fibrosis nor infarction. The endocardium was thin and transparent. The heart valves were normal in size and in shape. The foramen ovale was closed. The coronary ostia were patent. The ascending aorta was elastic and pliable. The greater veins were thin-walled and full.

LUNGS:
The lungs weighed together 1620 grams. They were markedly heavy and bulky, but normal in shape and configuration. The pleural surfaces were smooth and glistening. The tracheobronchial tree contained an abundant amount of purulent mucus. On sectioning of the lungs the cut surfaces were dark red-brown and consolidated with acute bronchopneumonia in the posterior and lower portions of both lungs. The pulmonary arterial tree was free of thromboemboli.

LIVER:
The liver weighed 1820 grams. The capsular surface was smooth and glistening. The inferior edge was sharp. On sectioning, the cut surfaces were uniform, red-brown and of normal consistency. The gallbladder contained 40 mls of bile.

SPLEEN:

The spleen weighed 220 grams. The capsule was smooth and glistening. On sectioning, the cut surfaces were dark purple and soft. The malpighian bodies were distinct.

K I DNEYS:
The kidneys together weighed 420 grams. They were similar in size and in shape. The capsules stripped easily, disclosing a smooth, reddish-brown surface. On sectioning, there was a clear demarcation between the cortical and medullary substances. The calyces, pelves and ureters were intact. The urinary bladder was empty. The testes and epididymides were normal to palpation.

PANCREAS AND ADRENAL GLANDS:
The pancreas was of normal size and shape. The cut surfaces were lobular, tan and firm. The adrenal glands showed a normal cortical-medullary distribution without focal lesions.

GASTROINTESTINAL TRACT:
The esophagus was lined by intact mucosa. The stomach was empty. The mucosa had normal rugal folds, without ulcerations. The duodenum was intact. The remainder of the small and large bowel was unremarkable. The vermiform appendix was surgically absent.

ORGANS OF THE NECK:
The cutaneous flap was reflected cephalad. The strap muscles were intact. The thyroid gland was unremarkable. The laryngeal cartilages, the hyoid bone and the cervical column were intact. The upper trachea and larynx contained an abundant amount of purulent mucus. The tongue, at its tip and right margin, had a healing bite mark measuring 1/2 inch in dimension.

HEAD:

On reflection of the scalp there was over the left frontal region a 1 1/2 inch galeal hemorrhage. There was hemorrhage into the left temporalis muscle. The calvarium, base of the skull and dura mater were intact. There was no skull fracture. There was no intracranial hemorrhage. The brain weighed 1320 grams. At the base, there was marked uncal grooving and cerebellar coning. Over the convexity there was flattening of the convolutions with squeezing out of the spinal fluid. Multiple coronal sections of the cerebrum, brain stem and cerebellum revealed an intact, symmetrical architecture with diffuse softening as seen in brain death. There was no injury.

DIAGNOSES:

1. Anoxic encephalopathy.
2. Cardiorespiratory arrest, by history.
3. Positional asphyxia, by history.
4. Aspiration bronchopneumonia.
5. Contusions of head, right upper arm and left abdominal flank .
6. Healing abrasions.
7. Post-operative state appendectomy, remote.
8. Obesity .

OPINION:

It is my opinion, based upon the autopsy findings and the history, that the decedent, JESUS MACARIO CASTILLO, came to his death as a result of anoxic encephalopathy due to cardiorespiratory arrest, due to positional asphyxia, following a struggle necessitating restrain because of a probable drug - related agitated state.

ROBERTO J. BAYARDO, M.D.
Chief Medical Examiner

RJB:sc

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Travis County Courthouse
P. O. Box 1748
Austin, Texas 78767

//TOXICOLOGICAL FINDINGS\\

CASE NUMBER: PA95-0022 DATE: 01/18/95

DECEDENT: CASTILLO JESUS :M
Last First MI

VOLATILES (Includes ethanol, methanol. isopropanol, and acetone).
BLOOD: NEGATIVE
URINE:
BILE:
VITREOUS: NEGATIVE
OTHER:

ACID/NEUTRAL DRUGS (Includes Anticanvulsants, Antihypertensives, and Sedative-Hypnotics).
RESULTS: BLOOD - NO DRUG DETECTED

ALKALINE DRUGS (Includes Antidepressants, Benzodiazepines, Cocaine, Narcotic Analgesics, Stimulants & Tranquilizers).

RESULTS: BLOOD - NO DRUG DETECTED
VITREOUS - NO AMPHETAMINE, COCAINE METABOLITE, OPIATE OR CANNABINOID DETECTED

MISCELLANEOUS:

COMMENT/OPINION:

ROBERTO J. BAYARDO, M.D.
CHIEF MEDICAL EXAMINER

SUZANNA E. DANA, M.D.
DEPUTY MEDICAL EXAMINER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCISCA CASTILLO,	§	
GILBERT CASTILLO,	§	
as Administrator	§	
of the Estate of JESUS	§	
CASTILLO,	§	
Deceased,	§	
	§	
VS.	§	
	§	No. A-96-CA-863-JN
CITY OF ROUND ROCK,	§	
TEXAS, OFFICER MICHAEL H	§	
KINCAIDE, #4101),	§	
CORPORAL THOMAS C.	§	
JACOBS, (#1404) and	§	
OFFICER SAMMY LEDESMA	§	
(#4112)	§	

DECLARATION OF PETER SCHARF

"I, Peter Scharf, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

"I am over eighteen years of age and competent to make this affidavit which is made upon my personal knowledge. A copy

of my resume, attached as Exhibit A and incorporated by reference herein, reflects my knowledge as an expert on the use of police force. My opinions are based on having reviewed the following documents: (1)depositions, police reports and statements of Officer Kincaide, Officer Ledesma, and Corporal Jacobs; (2) Medical Examiner's Report; (3) Round Rock Police Department's Use of Force and Restraints Policy; (4) Witness Statements of Annette Becker, Marlyn Hart, Mary Jo Collins, David Barrerra, Jr. Andres Leah, Jr., Jo Keeling, Karol Adams, George Ashford, Jennifer Lee; (5) Texas Penal Code and Code of Criminal Procedure; (6) Deposition of Wesley Wolff, Ronald Potts, and Dewayne Roberts; (7) Round Fire Department Records; and (8) Professional Paper by Donald Rheay, King County Medical Examiner.

"The above documents will be used as exhibits and in support of the opinions expressed at the time of trial.

CONCLUSIONS AND OPINIONS

"It is my opinion that positional asphyxia was a commonly known problem that a reasonable police officer should have been aware of on January 5, 1995. Well known agencies such as the International Association of Chiefs of Police and the National Institute of Justice have repeatedly warned police departments around the country of the risk of positional asphyxia when using force such as that used by the officers in this case. In the late 1980's, Donald Rheay, King County Medical Examiner authored a widely publicized professional paper on positional asphyxia. Dr. Rheay's paper explained that short, stocky people such as Mr. Castillo face a substantial risk of injury when placed in the prone position due to the pressure placed on the diaphragm. In 1992, a National Conference targeted to police chiefs was held in San Diego, California, to discuss the danger of positional

asphyxia when using force such as that used by the officers in this case.

"After reviewing the depositions of Wesley Wolff, Officer Kincaide, and Training Officer Ronald Potts, I learned that the City of Round Rock does not train its officers on positional asphyxia and, in fact, that they train their officers to place a knee in the back of suspects during the handcuffing procedure if the suspect is lying in the prone position. I consider this lack of training and awareness of positional asphyxia to be contrary to common training procedures employed by police departments in the State of Texas.

"The witness statements of Annette Becker and Marlyn Hart reflect that Marlyn Hart and Officer Kincaide were on Jesus Castillo's back for four (4) to six (6) minutes prior to the arrival of other officers or bystanders. After the arrival of the others, Mr. Castillo was still on his stomach while Andres Leah, Jr., David

Barrerra, Jr., Officer Ledesma and Corporal Jacobs all took their turns at holding him down. During this time, Mr. Castillo was heard by David Barrerra, Jr. to be screaming for help and begging for mercy from God. The total time of the arrest continued for about nine (9) to ten (10) minutes according to Officer Kincaide's statement and the Round Rock Fire Department Records. Mr. Castillo was finally rolled over only after his face had turned blue and he lay motionless.

"In my opinion, the officers violated Jesus Castillo's Fourth Amendment right to be free from unreasonable search and seizures due to the fact that they failed to appreciate the commonly known risk of positional asphyxia and failed to carry out commonly known methods of police procedure to eliminate the substantial and unreasonable risk of injury that positional asphyxia poses. Based on my experience in the use of police force and police training, I believe that handcuffing a suspect in the

prone position with weight on his back for a prolonged period of time is an unreasonably dangerous police procedure.

"In addition, I believe that Officer Kincaide's decision to knock the beer out of Decedent's hand was unreasonable under the circumstances. Based on my experience in police tactics and training, I believe that Officer Kincaide should have used less intrusive techniques such as verbal conflict avoidance or wait for specialized back-up to assist in the arrest. Such techniques are referred to extensively in law enforcement literature since the 1970's. Officer Kincaide's failure to utilize such techniques was unreasonable and constituted a violation of Decedent's Fourth Amendment rights to be free from unreasonable search and seizures.

"As reflected in my report attached hereto, Officers of the City of Round Rock violated Decedent's constitutional rights by knocking the beer bottle from his hand and by placing excessive

weight on his back while he laid in the prone position.

"I declare under penalty of perjury in accordance with 28 U.S.C. § 1746 that the foregoing is true and correct and that this declaration was executed on the 4th day of December, 1997, at New Orleans, Louisiana."

/ S /

PETER SCHARF

Expert Opinion of Dr. Peter Scharf regarding:

Castillo vs. Round Rock

Submitted by:

Dr. Peter Scharf

September 18, 1997

SECTION I. Witness Credentials, Qualification and Issues

1): Background and publications

I presently serve as Director for the *Center for Society, Law and Justice at the University of New Orleans*. I am the founding Director of this entity, which was founded in 1995. My duties at the *Center* includes:

- Management of the Center's law enforcement training, research and technical assistance projects;
- Training related to community policing and the use of force;

- Grant acquisition;
- Project management of Center's efforts

related to:

- Managing the Use of Force
- Community Policing
- ATF/NOPD Firearms control
- Technology Training in JPSO, SCSO, STSO, and others
- Criminal Justice Records
- EDLA/MDLA community policing
- Domestic Violence
- Assessment of ATF
- Professional training OPCS
- Serial killer taskforce technology
- Homicide improvement
- Jail planning

Prior to moving to Louisiana to be married, I served as *Director of Technology and Technical Assistance* at the *Police Foundation* in Washington DC (1992-1995). My responsibilities there included:

- Management of the Foundation's law enforcement training, research and technical assistance projects;
- Project development and division management;
- Training related to the Foundation's technical assistance and training activities;
- Grant proposal writing and contracts;
- Project management of foundation efforts related to:
  - Force Management System-later R.A.M.S.

- Community Policing through the BJA Consortium
- Crown Heights Civil Disorder Report
- Oregon State Ethics Report
- Management reports for law enforcement agencies
- Cultural Diversity for the US Customs service

Prior to my tenure at the foundation I taught criminal justice and sociology related courses at the University of California, Seattle University, City University and while in DC American University. My major publications related to this case include:

- Badge and the Bullet (New York, Praeger, 1983-6th printing)
- *Deadly force in Law Enforcement* in

Crime and Delinquency, 1982

- *Police-Citizen-Violent Encounter* in The Annals, 1980
- Assessing Law Enforcement Ethics (Washington, DC, Police Foundation, 1996)

Cases in which I have written reports, been deposed or testified (last five years) include:

- *Cleary vs. Smith-rights of prisoners*
- *Bimbaum vs. Tacoma-force (positional asphyxia)*
- *Thorn vs. Houston-force*
- *Dugas vs. Beaumont-arrest process*
- *Brooks vs. Pryor, OK-force(jail)*
- *Teral vs. Fort Worth-deadly force*
- *Riley vs. Newcastle(OK)-false arrest*
- *Waldron vs. McMillan-pursuit*

- *Erlve vs. Lafayette-deadly force*
- *Lavalats vs. Alexandria-force*
- *Benton vs. Woodward (OK)*

My education includes a BA (Honors) degree from the University of Rochester (1963) and an Ed.D. from Harvard in 1973 in Human Development and Sociology. My thesis was entitled the *Moral Atmosphere of the Prison* and was supervised by Lawrence Kohlberg one of the leading developmental psychologist, then living, in the world.

My fees in this case are $175 per hour and I have billed 22 hours to date in the case through presentation of this report.

Appendix 1: Appendix of Dr. Peter Scharf

2): Scope of Testimony:

I have been requested to review the social science and professional law enforcement literature's relative to the following questions related to *Castillo vs. Round Rock*

- Is there support in the professional and law enforcement literature to suggest that the tactics used by the City of Round Rock officers met or failed to meet minimum training standards related to the use of force by police officers. Specifically what standards might be defined related to:
    - The approach toward Mr. Castillo;
    - The use of force to knock the beer can from Mr. Castillo's hands; and
    - The management of police and citizen force against Mr. Castillo
- Is there support in the professional and law enforcement literature to suggest that the SOP's (standard operating procedures) and training standards employed by the department were consistent with standards defined by the industry regarding:
    - Force guidelines in place and used in training;

- Training and standards designed to manage officer's conduct with persons who were mentally disturbed; and
- The standards and training in place designed to define supervisory to manage the use of force;
- What support is there that the actions and policies of the Round Rock Police Department violated the civil rights of Mr. Castillo in unlawfully causing his death.

3): Workplan

The workplan employed in assisting the court resolve these issues involve the following tasks:

- Review of the complaint and defense response (2 hrs);
- Review of social science and professional literature related to keyword defined topics such as (6 hrs)
  - Use of force
  - Police supervision

- Positional asphyxia
- Deaths in custody etc.

- Review of depositions, training materials, etc (4 hrs)
- Drafting of expert report in following phases (10 hrs):
  - Computer database search
  - "Hard copy" search
  - Draft
  - Revision
  - Final review draft

4): Data and information Base

As a basis for forming an opinion in the Castillo case I reviewed the following types of literature:

- Sociological psychological and medical aspects related to the following topics:
  - the police use of force
  - officer initiated violence

- police care of mentally disturbed persons
- positional asphyxia

- Professional law enforcement and police management literature related to the following topics:
  - the management of force
  - training standards related to managing the use of force
  - managing police contacts with mentally disturbed persons
  - positional asphyxia

5): Major case issues:

A): Tactical issues:

Almost all police encounters have complex dynamics that evolve through a particular incident. In the Badge and the Bullet(1983), Arnold Binder and I developed a model to assess the progression of use of force incidents:

- Anticipation: information known prior to direct contact;
- Entry: initial positioning relative to subject;
- Dialogue: information exchange and communication;
- Final Frame: administration of use of force;
- Aftermath: action after the encounter

Viewed from this perspective, the following outline tactical issues to be reviewed in the case:

Anticipation related to tactical issues: Issues related to the dispatch call which described Mr. Castillo, and "cued" the officers as to the nature of the situation they would confront.

- √ What was known about the subject prior to contact with Mr. Castillo?
- √ How was deployment organized?
- √ Who was assigned as the supervisor in the

incident?

√ Did any supervisor or dispatcher realize that this could be a risk incident?

√ Was the prior to contact adequate given police professional standards?

Entry related tactical issues: Issues related to the *face to face* confrontation between the officers and Mr. Castillo including the knocking from his hand the beer can.

√ What did the officers observe about Mr. Castillo's demeanor?

√ How did they respond to his demeanor?

√ What was the impact upon Mr. Castillo of this first contact?

√ Did the contact procedures reflect standard methods approved by the profession?

Dialogue related tactical issues: Verbal and non-verbal

confrontation between the officers and Mr. Castillo.

- √ What verbal commands were attempted?
- √ How effective were these commands?
- √ What was the training to support these communication efforts?
- √ Was training adequate?
- √ Was communication consistent with commonly accepted professional standards?

Final frame related tactical issues: The effort to control Mr. Castillo with force, including the involvement of the civilians.

- √ What force was applied?
- √ Who applied it?
- √ What was training offered the Round Rock officers to define appropriate use of force?
- √ Was training provided in all forms adequate?
- √ Was the force used accepted professional

standards?

Aftermath related tactical issues: The call for medical assistance and any "investigation" which might have occurred.

- √ How did the officers respond to Mr. Castillo's physical distress?
- √ Was medical response adequate?
- √ How was incident investigated?
- √ Was this investigation adequate?

B): Training and supervision issues:

Training and supervision issues include both factual and evaluative issues:

- √ Did SOP's instruct officers how to deal with mentally disturbed persons?
- √ Was training offered in this police policy area?
- √ Were officers instructed as to how to

administer force?

√ What did training cover?

√ What training was offered regarding risks of positional asphyxia?

√ Was information as to the risk profile related to this death pattern offered officers?

C: Policy assessment

√ Did actions of the Round Rock Police department violate the rights of Mr. Castillo?

to end Mr. Castillo's life?

√ Were the training and operational policies of the Round Rock Police Department consistent with commonly accepted standards?

SECTION II. Opinions

II.1): Opinions as to the conduct of the Round Rock

Police Department prior to the final application of force against Mr. Castillo which lead to his death:

Following are opinions of this expert relative to actions of the Round Rock Police Department prior to the 'final' subduing of Mr. Castillo, which resulted in his death:

Opinion 1: The Round Rock Police Department failed to apply commonly accepted tactics when faced with an obviously mentally disordered individual:

There is evidence from the deposition material that none of the officers on the scene:

- Recognized the possibility that Mr. Castillo was mentally disturbed at the time of the incident;
- Understood that they had obligations to treat Mr. Castillo differently from a person without this type of disability;
- Applied tactics appropriate to the care of a mentally disordered person in their contact with Mr. Castillo;

- Discussed at the scene approaches which might be effective with this type of individual;
- Called for specialized response "back up";

It is probable that in knocking the beer can from Mr. Castillo's hand (the legal basis of this action is dubious) the officers may have exacerbated Mr. Castillo's agitation and anger. Also in a social psychological sense defining the initial contact situation as an offense, rather than a mental status call, the officers create a context for both the escalation of the incident and the tragic outcome which followed.

The foundation for this opinion lies in a cautious reading of the deposition material related to the conduct of the incident by the Round Rock Police Officers, arrest reports and other materials related to the incident. In spite of the fact that Mr. Castillo's mental status would have been obvious to even the most casual observer, the officers conducted the incident, as they would

have any other felony contact. For example, Officer Kincaide's deposition is important in the officer defines the first contact with Castillo as a contact in which there was an investigation of a relatively minor incident, but one that posed a high risk to the officer. Rather than calling for specialized back-up to assist in the matter, and ignoring that most force training teaches that stress alone cannot justify a use of force, the officer pushes the confrontation eventually knocking the beer from Castillo (p. 127-7ff) in effect precipitating the violence that followed:

Q: Okay. He's got the 12 pack in his hand....

A: The 12 pack in one hand.

Q: He's got the 12 pack in his hand and he gives you the stare.

A: Right.

Q: Have you told him to put it down?

A: Yes, that's why it was after that that he started staring at me.

There is an extensive professional law enforcement literature related to specialized approaches to persons, who because of mental status or other factors are disabled to the extent that their judgement is impaired in their contact with the police. These standards have been evolving as documented by the practitioner and social science literature involving the police since the mid-1970's. In these situations, the most commonly accepted practices of the profession suggests, it is imperative that the police officers involved in contacts with this type of person:

- Adopt *verbal conflict reduction* techniques
- Call for specialized backup as needed
- Allow for proxemic positioning appropriate to mental status of the subject
- Adjust tactics, consistent with officer safety, to the

requirements of dealing with this type of individual.

Opinion 2: <u>The Round Rock Police Department failed to employ reasonable supervision procedures to manage the use of force by its officers at the scene with Mr. Castillo</u>:

There is strong evidence from the deposition material that:

- There was confusion as to who was in charge to manage the confrontation with Mr. Castillo;
- No supervisor controlled the use of the civilians who intervened in the incident;
- No supervisor "*stood back*" to make objective assessments of the scene:
- No supervisor monitored the condition of Mr. Castillo during the incident;
- No one at all acted as the *operational supervisor* during the incident; and

- No officer acted to "check" the emotional flow that is inherent in this type of incident on the part of police officers and citizens.

Foundation for this opinion lies in a careful and objective reading of the deposition material and the research and practitioner literature related to the supervisory control of the use of force. A reading of the case level material suggests that there was little coordination among the officers or sense that anyone maintained supervisory integrity at the scene. The use of force research and practitioner literature suggests the importance of active and controlling supervision to manage excessive force by police officers in some of the following ways:

- Control of the scene to protect against unlawful actions;

- Establishment of lawful norms related to the use of force; and

- Monitoring of the "subjects" physical condition.

It is also clear to me that:

- That any reasonable and prudent law enforcement manager would have recognized these supervisory practices as unsafe;

- That also any reasonable and prudent law enforcement manager would have taken steps to avoid these field supervision patterns;

- That these supervision patterns contributed to Mr. Castillo's death;

- That proper field supervision could have avoided the outcome of this incident; and

- The failure to assure reasonable supervision violated Mr. Castillo's Civil Rights and contributed to his death.

II.2): Opinions as to the conduct of the Round Rock Police Department which were proximate to the final application of force

against Mr. Castillo which lead to his death:

Opinion 3: The Round Rock Police Department failed to employ lawful and safe force to safely control Mr. Castillo throughout the progression of the incident

There is substantial evidence from the deposition material that:

- Force was used in excess of that reasonably required to have Mr. Castillo comply with officer's request to drop the beer;
- Uncontrolled force was used through negligent supervision in the employment with implicit police consent to "jump" on Mr. Castillo;
- Force which any reasonable and aware officer or law enforcement manager would know might cause injury or death to Mr. Castillo as used in the "hog-tie" technique used to control this individual;
- The officers failed to monitor Mr. Castillo's health

and well being during what was obviously a high risk procedure;

- These actions conflicted with known and accepted police procedures;

- These uses of force by the Round Rock Police Department violated on their face Mr. Castillo's civil rights;

- Any reasonable and prudent police officer would have taken steps to avoid these unlawful uses of force; and

- Use of force contributed to Mr. Castillo's death;

Opinion 4: The Round Rock Police Department failed to heed known warnings related to the dangers of positional asphyxia in the confrontation with a subject with the physical size and comportment of Mr. Castillo;

There is very strong evidence from the deposition material that none of the officers on the scene:

- Recognized the possibility that Mr. Castillo was at

risk from becoming a victim of positional asphyxia;

- Were trained or warned about this possibility;
- Applied tactics appropriate to heeding this risk;
- Discussed at the scene approaches which might avoid this risk;
- Called for specialized response "support" to avoid these risks;
- Recognized that asphyxiation was taking place during the incident; and
- Adjusted tactics to protect Mr. Castillo's safety;

The foundation for this opinion lies in observations that:

- None of the officers involved in the incident apparently received any active training related to risks of positional asphyxia;
- None of the officers at the scene responded with common sense to avoid these risks, even as physical manifestation

of risks (e.g. oral fluid, foaming, etc.) became evident;

It should have noted that:

- Since the published recognition of death patterns by Donald Hey in the late 1980's, though the date of the incident 1-5-95:

- There have been repeated warnings about the risks of positional asphyxia from agencies as diverse as the *National Institute of Justice* to the *International Association of Chiefs of Police* as well s local and regional authorities;

- Many departments had initiated training related to positional asphyxia; and

- Many departments had banned the "hog-tie" technique associated with positional asphyxia.

It also was noted that:

- Any reasonable and prudent law enforcement manager would have recognized the hog-tie practice as unsafe;

- Also, any reasonable prudent law enforcement manager would have taken steps to either eliminate the hog-tie technique or train officers in its most cautious use;

- The improper use of the hog-tie technique by the Round Rock Police Department violated on their face Mr. Castillo's civil rights;

- That any reasonable and prudent police officer or law enforcement manager would have taken steps to avoid this technique known to be associated with sudden death in custody outcomes; and

- That the application of the *hog-tie* technique and its mis-application contributed to Mr. Castillo's death.

II.3): Opinions as to the conduct of the Round Rock Police Department in regards to training, procedures, personnel, "organizational culture" and supervision:

Following are opinions regarding implementation of

training, policy, personnel, "organizational culture" and supervision standards related to the use of force.

Opinion #5: (Regarding training standards initiated by the Round Rock Police Department related to the use of force) The Round Rock Police Department failed to develop adequate pre-employment, FTO or "*roll call*" training programs designed to address police officer performance in the following major areas:

- Special tactics required to deal with mentally disordered persons;
- The use of force;
- The supervision of the use of force;
- The use of the "hog-tie" technique; and\
- The risks of positional asphyxia.

The foundation for this is as follows:

A review of training documents and deposition material from Training officers and the Chief as well as FTO reports

suggests that there was no training offered related to Special tactics required to deal with mentally disordered persons. Chief Wolf acknowledges this on page 133: 9ff.

Q: Okay there are no policies and procedures at Round Rock at the time that treated mental patients or mental suspects different than normal individuals.

A: Not that I can recall.

Q: Okay and that is acceptable according to the policies and procedures that you had in force.

A: Yes.

Similarly, use of force training appears minimal and poorly delivered. The Officer safety component of the field officer training program suggests such information (p37) as:

Q: Paranoia

- The IPO will be evaluated on his ability to balance

common sense with good officer safety techniques to ensure self-confidence when handling police matters.

Obviously, this type of information is inadequate to prepare to meet the complex demands that lawful use of force demands.

Similarly I was unable to find any indication that there was any systematic training related to the supervision or management of force, targeted at supervisors or that there was any active training as acknowledged by supervision or management of force, targeted at supervisors or that there was any active training as acknowledged by Chief Wolf (p.50.20 f) that there was any training related to the hog-tie technique or the risks of positional asphyxia.

I also find that:

- Any reasonable and prudent administrator would have implemented effective training related to the care of

emotionally disturbed persons, the use of force, force supervision, hog-tie technique and positional asphyxia;

- Most if not almost all departments of the size of Round Rock had implemented this type of training;
- Prior uses of force by officers including an Officer Kincaide involved in the incident should have alerted the department to the need for extensive training; and
- This failure to train contributed to the officers handling of the Castillo incident.

Opinion #6(Regarding policies implemented by the Round Rock Police Department designed to control unlawful uses of force by police officers): The Round Rock Police Department failed to develop effective and adequate standard operating procedures related to managing the use of force by police officers, the supervision of force, the "hog-tie" technique and the risks of positional asphyxia.

The opinion as to the absence of clear and effective policy initiatives related to the use of force by officers is grounded in such information as:

- Deposition of Chief Wolf
- Conduct of the officers
- Policy manual
- FTO manual

It is further found that policies that were implemented were often vague, cliche ridden and ambiguous, as in the FTO manual's description of "mental patient management." (sic the IPO will be expected to know all department policies and procedures dealing with mental patients or "the IPO will be evaluated on these methods of maintaining control over persons involved in conflict to enable them to be dealt with easily."

Clearly a department must implement policies in these areas and examples of policies, far more comprehensive than

those found in Round Rock are easy to find, even among smaller jurisdictions in less affluent areas.

Opinion #7: (regarding personnel management). The reviewer was *troubled* by the apparent failure of the department to review and take action against officers who had repeated histories of problem contacts with citizens complaints, founded internal affairs and issues related personal conduct.

In forming this opinion this expert considered:

- Personnel "envelopes";
- Depositions related to line officers and administrators;
- Incident report; and
- The absence of actions following a series of performance related incidents by officers.

Opinion #8: (Regarding the "Organizational Culture" of the Round Rock Police Department relative to the use of force):

There was a *tone* in reading of many of the incident reports and deposition material in that there was a permissive culture or value set related to the use of force which contributed to the use of force against Mr. Castillo.

The foundation for this opinion lies in the observation of many of the documents that the administration of the Round Rock Police Department did not take seriously its obligation to protect the Civil Rights of citizens. In reading many of the verbatim reports I was asked to review it was evident an "*us vs. them*" tone which would lead an officer to conclude that the values of the agency did not concern itself deeply with the rights and beliefs of citizens. In the Civil Disorder Report related to the 1992 Los Angeles Civil Disturbance, report authors William Webster and Hubert Williams observed that the then Chief Daryl Gates may have "created an organizational climate" in which the actions directed at Rodney King might be placed in context. It is

my belief that a similar organizational moral climate may have existed within the Round Rock Police Department. Key in forming this opinion are the following observations:

- The failure to investigate serious abuses of force;
- "Glib" reference to citizens in many of the documents initiated by officers; and
- The implicit tone of training materials.

Opinion #9: (related to supervision and management of the force within the Round Rock Police Department) There appears to have been a pattern of poor or incomplete supervision of extremely serious incidents related to a variety of use of force by police officers.

Foundation for this observation lies in such observations as:

- The absence of "on-scene" management of any of the use of force incidents reviewed by this expert;

- The failure to review major abuses of force by officers; and

Opinion #10 (Summary of opinions related to training and procedures): It is the opinion of the expert that the training and policies were inadequate in terms of preventing the abuse of force by its officers. Specific concerns in this regard include:

- The failure to establish reasonable training to respond to incidents which had already occurred;
- The failure to establish reasonable procedures to control the use of force by Round Rock officers;
- The failure to establish personnel, investigative and officer review procedures related to the use of force;
- The failure to maintain a positive organizational climate related to the use of force, and
- The failure to maintain realistic supervision related to the use of force by police officers.

II.3): Opinions as to the conduct of the Round Rock Police Department related to the violation of Mr. Castillo's Civil Rights and the cause of his death:

Opinion #11: The actions of the Round Rock Police Department violated the Civil Rights of Mr. Castillo.

The foundation of this opinion lies in the following assumptions:

- The *Round Rock Police Department* used tactics against Mr. Castillo which a reasonable and prudent administrator would have recognized as likely to violate the Civil Rights of citizens; and
- The department failed to provide minimally effective training, procedures, organizational values, personnel practices and supervision systems to protect persons such as Mr. Castillo from having their civil rights violated.

Opinion 12: The actions of the Round Rock Police Department

presented known physical risks to Mr. Castillo and possibly ended his life.

Information available to any reasonable and prudent law enforcement administrator would have led that person to conclude:

- That the tactics used in the incident had a high risk of causing injury;
- That these tactics were especially dangerous as used by the Round Rock Police; and
- That these tactics contributed to the death of Mr. Castillo.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCISCO CASTILLO	)	
OLIVIA LOPEZ, JOHN	)	
CASTILLO, MARY CARLEEN,	)	
FRANCIS DELGADO, LUIZ	)	
CASTILLO, GILBERT	)	
CASTILLO, RAYMOND	)	
CASTILLO, RUSSELL	)	
CASTILLO, JOE CASTILLO	)	
PETE CASTILLO, PAT	)	
SALAZAR, AND VICKI SHAW	)	
	)	
VS.	)	No. A-96-CA-863
	)	
CITY OF ROUND ROCK,	)	
TEXAS, OFFICER MICHAEL	)	
H. KINCAIDE, CORPORAL	)	
THOMAS C. JACOBS, AND	)	
OFFICER SAMMY LEDESMA	)	

****

VIDEOTAPED DEPOSITION OF MICHAEL KINCAID
VOLUME I

****

. . . (p.56)

[15] QUESTION (BY HASLAM): Have you ever seen, met or heard of Mr. Castillo before January 5,

1995?

[17] ANSWER (BY KINCAIDE): Yes.
[18] QUESTION: Okay. How many times?
[19} ANSWER: Throughout my childhood. I knew him through high school and whatnot I knew of him and knew some of his brothers

. . . (p.57)

[15] QUESTION: Okay. When did you first come to know Jesus?
[17] ANSWER: In high school. I would see him around.
[18] QUESTION: 10th grade, senior or what?
[19] ANSWER: Throughout.
[20] QUESTION: Throughout 10th, 11th, 12th?
[21] ANSWER: Yeah.

. . . (pp.66-67)

[25/1] QUESTION (BY HASLAM): When you came up -- when you first saw Mr. Castillo at any time on January 5, 1995, did you realize it was Mr. Castillo?
[3] ANSWER (BY KINCAIDE): I did, yeah.

. . . (pp.99-112)

[22] QUESTION (BY HASLAM): How close were you to him?

[23] ANSWER (BY KINCAIDE): Within arms' reach.

[24] QUESTION: Okay, why did you get that close to him to begin with?

[1] ANSWER: I was trying to talk to him. I thought maybe he and I could just communicate and I could talk.

[4] QUESTION: Why?

[5] ANSWER: I recognized who he was, I addressed him by his name and thought, "hey, this guy knows me, we could, maybe we could just talk"

. . .

[12] QUESTION: What happened next?

[13] ANSWER: I told Mr. Castillo that he needed to put the beer down. He had a twelve-pack of beer in his left hand and he had one opened beer in his right hand. I told him, "Mr. Castillo, please put the beer down." He put the case down.

. . .

[1] QUESTION: How far are you from him?

[2] ANSWER: Probably about -- maybe 10 feet or so.

. . .

[4] QUESTION: Okay. And you recognized off the bat that his guy is not normal?

[6] ANSWER: Right.

. . .

[25/1] QUESTION: Okay. What was it about -- was there something about the way he was carrying it?

[2] ANSWER: His demeanor, everything that you described earlier, his entire -- he wasn't acting normal.

. . .

[18] QUESTION (BY HASLAM): Okay. When did the fight take place in that incident?

[20] ANSWER (BY KINCAIDE): When I had him turn around and was asking him to put his hands back behind his back.

[23] QUESTION: You had his cuffs out?

[24] ANSWER: He got one hand, just as I had one hand, I just got the cuff on, he turned on me.

[1] QUESTION: And that is when the fight started?

[2] ANSWER: The fight started.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FRANCISCO CASTILLO	)	
OLIVIA LOPEZ, JOHN	)	
CASTILLO, MARY CARLEEN,	)	
FRANCIS DELGADO, LUIZ	)	
CASTILLO, GILBERT	)	
CASTILLO, RAYMOND	)	
CASTILLO, RUSSELL	)	
CASTILLO, JOE CASTILLO	)	
PETE CASTILLO, PAT	)	
SALAZAR, AND VICKI SHAW	)	
	)	
VS.	)	No. A-96-CA-863
	)	
CITY OF ROUND ROCK,	)	
TEXAS, OFFICER MICHAEL	)	
H. KINCAIDE, CORPORAL	)	
THOMAS C. JACOBS, AND	)	
OFFICER SAMMY LEDESMA	)	

AFFIDAVIT OF ELIZABETH MAYA

BEFORE ME, the undersigned authority, on this day personally appeared ELIZABETH MAYA, who being by me first duly sworn, upon her oath depose and state:

"My name is Elizabeth Maya. I am over twenty-one (21) years of age and I have never been convicted of a felony. I am of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein:

"I was at the bank drive-through on January 5, 1995

when I saw a Hispanic male walking into the parking lot with a six pack of beer and one opened beer bottle. I saw a police officer walk up to the Hispanic male. I heard the police yell at the Hispanic male to stop where he was.

The Hispanic male put the six pack down, took a drink of his beer and then the officer knocked the beer bottle out of his hand. The Hispanic male never threatened the police officer or raised the beer bottle in a threatening manner. Next, I saw them start fighting and fall to the ground. The police officer held the Hispanic male on the ground when several citizens got out of their cars and began helping the police officer hold him down. They held the Hispanic male down with their hands, legs and knees. There was no way for the Hispanic male to get up after he was down. The Hispanic man never seemed to be a danger to anyone.

/ S /

_____

ELIZABETH MAYA

SWORN TO AND SUBSCRIBED BEFORE ME on this the 5th day of December, 1997.

/ S /

_____

NOTARY PUBLIC
IN AND FOR THE STATE OF TEXAS

[NOTARY SEAL]

Supreme Court, U.S.
FILED
OCT 21 1999
OFFICE OF THE CLERK

No. 99-219

In The

Supreme Court of the United States

FRANCISCA CASTILLO, GILBERT CASTILLO, AS ADMINISTRATOR OF THE ESTATE OF JESUS CASTILLO, DECEASED,

Petitioners,

v.

CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) AND OFFICER SAMMY LEDESMA (#4112),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Does a police officer violate a person's clearly established constitutional right when the officer places a combative person who resists arrest in the prone position, and applies pressure to the person's back to overcome the resistance, so that the person's hands and/or feet may be cuffed to control the person's resistance and place the person in custody?

Does a routine police procedure violate the *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) standard of objective legal reasonableness when a combative person who resists arrest stops breathing after having been restrained in a prone position with pressure applied to his back so that officers could overcome what is reasonably perceived as continued resistance to arrest, and place cuffs on the person's hands and/or feet to take him into custody?

May an appellate court, in an interlocutory appeal of the denial of a motion for summary judgment based on qualified immunity, determine whether a police officer's use of force meets the *Harlow* standard of "objective legal reasonableness" without violating the rule in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), and the finality rule of 28 U.S.C. § 1291 which prohibit interlocutory review of issues of law not separable from the fact determinations necessary to their resolution?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the unpublished *per curiam* decision of the United States Court of Appeals for the Fifth Circuit entered in *Castillo, et al. v. City of Round Rock, Texas, et al.*

JURISDICTION

Although this Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c), this case does not satisfy the general considerations governing review on a writ of certiorari outlined in Rule 10(a) of the Supreme Court Rules. As discussed in more detail below in the "Reasons to Deny the Petition," the Fifth Circuit's unpublished *per curiam* opinion does not conflict with any decision of another United States court of appeals on any important matter, and has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

STATEMENT OF THE CASE

Petitioners' mischaracterization of the summary judgment evidence[1] and blatant attempt to have this

[1] As discussed more fully in "Reasons for Denying the Petition," Petitioners' Petition mischaracterizes the officers' actions as "hog-tying" even though Petitioners never made this argument to the district court, and the evidence is insufficient as a matter of law to conclude that the officers "hog-tied" Jesus Castillo.

Court consider matters outside the summary judgment record[2] compels Respondents to correct the statement of the case found in the Petition. Moreover, Petitioners' failure to present, **with accuracy**, the facts that are essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny this Petition in accordance with Rule 14.4 of the Supreme Court Rules.

This is an appeal from an order filed on February 2, 1998, partially denying summary judgment on the basis of qualified and official immunity. Respondents Kincaid, Jacobs, and Ledesma timely filed their notices of appeal

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[2] Despite Petitioners' erroneous representation to this Court to the contrary, the Fifth Circuit Court of Appeals' Rules do not require that the complete record of the case remain at the trial court during the appeal process. The Fifth Circuit had the benefit of all of the summary judgment evidence that was on file with the district court when it issued its opinion. Petitioners, however, attempted to present evidence outside of the summary judgment record to the Fifth Circuit at oral argument and in their motion for rehearing. Petitioners' App. 6 n.1; Respondents' App. A-2. The Fifth Circuit refused. Respondents' App. A-5. Petitioners now seek to have this Court consider deposition testimony of Michael Kincaid that is outside the summary judgment record by arguing that because the district court, at the summary judgment hearing, overruled an objection to Petitioners' mention of certain deposition testimony that was not part of the summary judgment record, the entire deposition became part of the summary judgment record even though it was not filed with the district court and the portions of the deposition that Petitioners now seek this Court's consideration was never mentioned to the district court at the summary judgment hearing. Petitioners' App. 29-32, 97-100. This Court must likewise refuse Petitioners' invitation to consider matters outside the summary judgment record.

on February 9, 1998. The district court had subject matter jurisdiction over the federal civil rights claims pursuant to 28 U.S.C. § 1331, and over supplemental State law tort claims under 28 U.S.C. § 1367.

The following facts are taken solely from and cite Petitioners' summary judgment evidence, unless otherwise indicated. On January 5, 1995, around 4:30 p.m., the dispatchers for the Round Rock Police Department began receiving citizen reports on its 911 system about a Hispanic male yelling and banging on cars as he crossed Highway 620 at the Interstate 35 by-pass bridge on foot. (R. 819-824.) The dispatchers relayed the information to Ledesma, a patrol officer, who proceeded toward the area in response. *Id.* Kincaid, another patrol officer, informed the dispatcher that he was available and would also respond as he was closer to the area than Ledesma. *Id.* (R. 775-777.) While Ledesma and Kincaid were driving to the location, the dispatchers received another 911 call stating that a Hispanic male was stealing popcorn and a 12-pack of bottled beer from a Texaco station in the same area. (R. 775-777; 819-824.) The dispatcher relayed this information to the officers. *Id.*

Kincaid was the first to locate Jesus Castillo ("Castillo"). It was at approximately 4:33 p.m. and Castillo was walking across the drive thru lanes of a bank near the intersection of Highway 620 and Interstate 35. (R. 775-777.) Castillo, obese, Hispanic and wearing short pants in near freezing weather, matched the description by the 911 callers, and he also had an open beer bottle in one hand and the remainder of a 12-pack of beer in the other. *Id.* Castillo was five feet three inches tall, weighed 248½ pounds, and had been diagnosed with exogenous

obesity. (R. 851; 860.)[3] When Kincaid instructed Castillo to put the beer down, he placed the 12-pack on the ground but proceeded to drink beer from the open bottle rather than putting it down. (R. 775-77.) Castillo raised his hands above his head, with the bottle still in one hand, and stated that someone was "going to die." *Id.* Kincaid perceived this as a threat. *Id.* Kincaid knocked the bottle out of Castillo's hand, thereby disarming him. (R. 775-777.) Castillo then attacked Kincaid. (R. 713; 716; 718; 723; 726; 729.) Kincaid struggled with Castillo but was unable to control him. *Id.* Castillo and Kincaid's struggle went to the ground and then citizen bystanders attempted to aid Kincaid in subduing Castillo. *Id.* The dispatchers received a 911 call from a bank teller reporting that an officer was struggling with a suspect in the bank parking lot and needed help. (R. 819-824.) Kincaid shouted for someone to get on the radio in his vehicle

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[3] Castillo, a 39-year-old high school graduate suffering from schizophrenia, lived at home with his mother. (R. 841.) Castillo had received services from the Williamson County Mental Health Center beginning in August, 1988 because of his history of psychotic symptoms and several psychiatric hospitalizations. (R. 836-37.) Until June 1994, Mellaril was prescribed for his schizophrenia. *Id.* Castillo was not taking medication just prior to his death. (R. 846.) His counselors were reluctant to place him on Mellaril because he told them he drank 4-5 beers a day, 4-5 days a week. *Id.* Nonetheless, Castillo obtained a prescription for Mellaril on January 4, 1995, and filled it on January 5, 1995, the date of his death. (R. 861.) However, he never received that medication. *Id.* None of the officers involved in arresting and restraining Castillo on January 5, 1995 knew anything about his medical history, his mental problems, or that he had not taken his medication in over six months.

and call dispatch for help. (R. 775-777; 815-824.) A female bystander radioed dispatch that Kincaid was struggling to control the suspect and needed assistance. (R. 775-780; 815-824.) When Ledesma arrived on the scene, he also assisted in the attempt to restrain and control Castillo. (R. 775-780; 799-800; 815-824.) Kincaid and Ledesma, with citizen assistance, managed to handcuff Castillo. (R. 775-780.) Corporal Jacobs was less than a minute from the site of the incident when he overheard the citizen radioing that an officer needed assistance. (R. 772-773.) En route to the scene, Jacobs instructed the dispatcher to clear channel 1, over which the call came from Kincaid's radio, and to get help from other law enforcement authorities. (R. 819-821.) When Jacobs arrived on the scene, Kincaid and Ledesma were still struggling to get Castillo under control, though his hands had been cuffed. (R. 772-777.)

Because Castillo continued to kick and yell, Jacobs assisted Kincaid and Ledesma to put flex cuffs on Castillo's legs. *Id.;* (R. 817.) Ledesma went to get the flex cuffs and Kincaid and Jacobs continued to try to restrain Castillo, who kept on kicking and yelling. (R. 772-777; 817.) During this time Jacobs noticed that Kincaid's face and nose were bleeding and radioed the dispatcher to send an ambulance to the scene as an officer was injured. (R. 772-773; 819-821.) Fire Department records reflect that its first responders were dispatched and en route at 1640 (4:40 p.m.) and arrived on the scene at 1642 (4:42 p.m.). (R. 828.) The officers placed leg restraints on Castillo during the two-minute period it took the Round Rock Fire Department first responders to arrive. (R. 772-777.) Castillo kept kicking his legs and yelling at the officers

until his feet were cuffed. *Id.;* (R. 779-800; 804-805; 815-817.) Once Castillo's feet were restrained he stopped struggling, the officers rolled him over, and they noticed that his face was turning blue. *Id.* The entire struggle lasted approximately ten minutes, *i.e.,* from Kincaid's arrival at 4:33 to the arrival of Fire Department's first responders at 4:42. (R. 775, 828, 879.) No mace, club, or stun gun was used. (R. 777.)

The Fire Department first responders arrived on the scene within seconds of when Castillo's legs were restrained and he was rolled onto his side/back. (R. 775-777; 804-805; 815-817.) EMS records indicate that they were dispatched and went en route at 1639 (4:39 p.m.) and arrival at 1642 (4:42 p.m.), arriving within two minutes of restraint of Castillo's legs and turning him over. (R. 869.) Castillo received medical treatment immediately from Round Rock police officers, fire fighters and EMS, but never regained consciousness. (R. 828; 869.) After remaining comatose on life support for approximately one week, Castillo died on January 12, 1995, shortly after he was removed from life support upon the request of his family. An autopsy by the Travis County Medical Examiner revealed that Castillo had an enlarged heart, (R. 698), a pre-existing medical condition that could not have been detected by a reasonable law enforcement officer on January 5, 1995. (R. 364, Defs' Med. Expert Report). The Round Rock Police Department has never had an arrestee die in custody or suffer any significant injury as a result of being placed face down on the ground in the prone position because he or she resisted arrest. (R. 397, Aff. of Raymond Kuhlmann). The Travis County Medical Examiner's report concluded that Castillo died "as a result of

anoxic encephalopathy due to cardio respiratory arrest, due to positional asphyxia, following a struggle necessitating restraint because of a probable drug-related agitated state." (R. 700.)

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's opinion is not in conflict with any other United States Court of Appeals' decision or with any prior Fifth Circuit decision as this case does not involve "hog-tying."

Petitioners contend that Respondents "hog-tied" Jesus Castillo; such a technique is known by law enforcement officers to carry with it a substantial risk of causing death or serious bodily harm and is thus deadly force as a matter of law; and/or, alternatively, that a fact finder should determine whether the "hog-tying" technique is a use of deadly force. For the reasons discussed below, Petitioners arguments fail, thus their Petition should be denied.

A. This Case Does Not Involve "Hog-tying."

The force at issue in this case is distinct from the "hog-tying" discussed in *Gutierrez v. City of San Antonio*, 139 F.3d 441, 443 (5th Cir. 1998). In *Gutierrez*, officers used a privately purchased nylon rope to loop around the arrestee's feet and then connect the arrestee's feet to his handcuffs, "drawing [the] legs backward at a 90-degree angle in an 'L' shape, thereby 'hog-tying' him," and then transporting him in a vehicle in that position. *Id.* The Fifth Circuit issued a "very limited" holding that in a

limited set of circumstances – *i.e.*, when a drug-affected person in a state of excited delirium is hog-tied and placed face down in a prone position – hog-tying could be classified as "deadly force." 139 F.3d at 451. Because of disputed facts regarding whether deadly force was justified under the circumstances, and the undisputed facts not favorable to the officers in *Gutierrez*, the Fifth Circuit concluded that it could not determine whether the hog-tying at issue was objectively reasonable under a Fourth Amendment analysis. *Id.*

In the case at hand, no rope or any other restraint connected the cuffs on Castillo's hands and feet, and no "hog-tie" contorted his body into an L-shape. As soon as the flex-cuffs were placed on Castillo's ankles and his legs were under control, he immediately was turned over. In other words, although the officers cuffed Castillo's hands behind his back, and placed his legs in flex-cuffs when he continued to kick, at no point did they connect the two sets of cuffs – a far more restrictive and dangerous procedure known as "hog-tying."[4]

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[4] The sworn "Declaration of Peter Schare," Petitioners' police expert, is not to the contrary. There is no mention of "hog-tying" in Peter Schare's **sworn** summary judgment testimony. Petitioners' App. 52-58. Schare attached his resume to, and incorporated it into, his sworn declaration. Petitioners' App. 53, 59-64. Petitioners, however, also attached to Schare's sworn declaration pages of an unsigned unsworn preliminary report which Schare did not explicitly incorporate by reference into his sworn declaration. Petitioners' App. 65-96. Such unsigned unsworn testimony is not competent summary judgment evidence, and furthermore, it does not contain any facts which would bring the Castillo incident within the Fifth Circuit's definition of "hog-tying" as set forth in *Gutierrez*.

B. A Law Enforcement Officer's Use of the Prone Position to Restrain Combative Suspects is Not "Deadly Force" as a Matter of Law.

The prone position is a routine police procedure and is one of the more moderate means of subduing an arrestee who is combative and resists arrest. (R. 473.) The type of prone restraint at issue in this case is comparable to the force at issue in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), *cert. denied*, 118 S.Ct. 1052 (1998) which the Seventh Circuit deemed reasonable under circumstances strikingly similar to those in the instant case. *See* 123 F.3d at 593-94 (noting that "placing someone in a prone position while handcuffed on the floor does not, in of itself, violate the Fourth Amendment"). In fact, *Gutierrez* explicitly distinguished the reasonable force at issue in *Phillips* from the "hog-tying" at issue in *Gutierrez*, 139 F.3d at 450-51. *Phillips*, too, made clear that the force at issue there was not "hog-tying," but a more moderate form of restraint. *See* 123 F.3d at 594. In light of the explicit distinctions made by the Fifth and Seventh Circuits in *Gutierrez* and *Phillips*, Petitioners' attempt to demonstrate a split between those circuit courts lacks merit. Moreover, because the facts of this case are strikingly similar to the *Phillips* case, there is no intra-circuit conflict between the unpublished *per curiam* decision at issue herein and the *Gutierrez* decision.

Petitioners also argue that, despite the holding in *Phillips* regarding the reasonableness of police officers' use of the prone position to control combative suspects, the testimony of their medical expert and use-of-force expert establishes, as a matter of law, that use of the prone position constitutes "deadly force." Pet. 16. This

Court, however, has cautioned that it would be hesitant "to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement." *Tennessee v. Garner*, 471 U.S. 4 (1985). Not only does Petitioners' use of force expert fail to comment on the degree to which banning use of the prone position would hamper effective law enforcement, he does not even acknowledge in his sworn testimony that Castillo was resisting arrest.[5] Petitioners App. 52-58. This Court, however, has held that authorities must be allowed "to graduate their response to the demands of any particular situation." *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (quoting *United States v. Place*, 462 U.S. 696, 709 n. 10 (1983)).

The undisputed summary judgment evidence establishes that (1) even after being wrestled to the ground and placed in the prone position, Castillo resisted the officers' and citizens' efforts to handcuff him by keeping his hands beneath himself;[6] (2) even after his hands were

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[5] Similarly, Petitioners do not disclose to this Court in their Petition that Castillo was perceived by the officers as resisting arrest until the point his legs were cuffed. Their description of the issue of deadly force simply refers to "a person's body who has participated in a strenuous activity" being placed in a prone position with his hands cuffed behind him and weight placed on his back. Pet. 16. Again, Petitioners have failed to present, **with accuracy**, the facts that are essential to ready and adequate understanding of the points requiring consideration by this Court.

[6] Eyewitness Annette Becker described Castillo as having on short pants and a black jacket. (R. 729.) The officers and citizens struggling to get Castillo under control had no way of knowing what he might have in his pockets.

pulled from beneath him and cuffed, Castillo continued to kick and to resist arrest, for whatever reason, until the point his legs were flex-cuffed; and (3) the entire struggle lasted approximately ten minutes. (R. 775, 828, 879.) It is also undisputed that Castillo was turned over immediately after his legs were restrained. (R. 799-800; 804-805; 815-817.)

Although Petitioners contend that Castillo was kicking because he could not breathe, whereas the officers believed that he was kicking in order to resist arrest, it remains undisputed that Castillo did, in fact, continue kicking up until the moment his ankles were flex-cuffed. An individual has no clearly established Fourth Amendment right to be free from efforts to bring him under control in the face of ongoing resistance to arrest.[7]

Even assuming the officers were mistaken in their belief that Castillo's kicking was resistance, and that Plaintiffs are correct that the kicking instead indicated Castillo's inability to breathe, the officers' mistaken belief nonetheless was objectively reasonable under the circumstances. Faced with a volatile and extremely tense street

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[7] *Estate of Phillips*, 123 F.3d at 593 ("Restraining a person in a prone position is not, in and of itself, excessive force when the person restrained is resisting arrest."). *See also Mayard v. Hopwood*, 105 F.3d 1226, 1227-28 (8th Cir. 1997) (holding that officers who handcuffed struggling suspect, threw her face down on rear seat of police car, and placed her legs in a hobble restraint when she started kicking in back of car were objectively reasonable "particularly . . . in light of Mayard's resistance," and that no constitutional violation occurred under these circumstances).

scene, and trying to gain control over a large and belligerent suspect who presented a potential threat to community bystanders, to the officers, and to himself, and who continued kicking at the officers despite their best efforts to subdue him, it was entirely reasonable to place him prone on his stomach until they could cuff his ankles and get his legs under control. As long as Castillo continued to resist arrest or reasonably appeared to the officers to be resisting arrest, it was necessary to minimize the danger to the officers and the bystanders by restraining Castillo to the maximum extent possible. Regardless of whether Castillo kicked because he could not breathe, or kicked because he intentionally was resisting arrest, there is no dispute that he did, in fact, kick. Furthermore, Plaintiffs maintain that Castillo was yelling at the officers in Spanish during the struggle, which might indicate to reasonable officers that Castillo not only could breathe, but also had enough breath to yell. (R. 718.) Under these circumstances, it would be reasonable for the officers to perceive Castillo's kicking as resistance and to hold Castillo in a prone position while they continued their efforts to get him under control and into custody.

After viewing all factual discrepancies in favor of Petitioners, the Fifth Circuit concluded as a matter of law that a reasonable officer could have perceived Castillo's kicking, yelling and bloodying Officer Kincaid's nose as hostility and resistance to arrest even if it was in fact a panic reaction to his positional asphyxia. Petitioners' App. 11. Given that officers in this case had to restrain Castillo as he continued kicking, and that they chose not to use guns, billy clubs, choke-holds, hog-ties, or other

weapons, few choices remained. They had little alternative other than to keep Castillo prone until they could stop his kicking and be assured that Castillo no longer posed a danger to the officers or bystanders in the street.[8] The summary judgment record in this case would not permit this Court to hold that a police officer's use of the prone position is an unreasonable use of deadly force as a matter of law.

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[8] Petitioners contend that it was unreasonable for an officer in these circumstances not to have recognized the risks associated with positional asphyxia and not to have taken measures to prevent the condition from occurring. Respondents note that, unlike the hog-tying case, *Gutierrez*, where the summary judgment record included: articles on hog-tying and positional asphyxia, evidence that the articles had been sent to the very police department named in the suit, and evidence suggesting the officers in that case previously had been instructed not to use hog-ties yet disregarded those instructions, *see* 139 F.3d at 448-49, there is no such comparable evidence in the summary judgment record of this case. Petitioners submitted no articles regarding the dangers of restraining someone in a prone position, nor any evidence that such articles had been sent to the Round Rock Police Department, nor any evidence that the officers previously had been told not to use the prone position yet disregarded those instructions. No such evidence exists.

II. An appellate court does not violate the rule in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), or the finality rule of 28 U.S.C. § 1291 which prohibit interlocutory review of issues of law not separable from the fact determinations necessary to their resolution, when it determines whether a police officer's use of force meets the *Harlow* standard of "objective legal reasonableness" in an interlocutory appeal of the denial of summary judgment based on qualified immunity.

In *Behrens v. Pelletier*, 516 U.S. 299 (1996) this Court reaffirmed that its decision in *Johnson v. Jones*, 515 U.S. 304 (1995) "permits [a] petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of "objective legal reasonableness." *Behrens*, 516 U.S. at 313. Petitioners argue that there is no final decision in this excessive force case because the question decided is not truly separable from plaintiff's claim. Pet. 22-23. Petitioners, however, misunderstand the significant differences between the objective legal reasonableness standard from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and the *Graham v. Connor*, 490 U.S. 386 (1989) excessive force standard.

Although the touchstone for qualified immunity (objective legal reasonableness) and the benchmark for determining excessive force (objectively reasonable force) sound alike, the two inquiries are not identical. *Graham*'s multi-factor excessive force standard may permit a substantial degree of latitude and discretion, but it does not afford the same protections as qualified immunity.

Graham has no comparable allowance for reasonably mistaken beliefs about the constitutionality of an officer's conduct. Although *Graham* analyzes the reasonableness of force from the perspective of a "reasonable officer on the scene, rather than with the 20/20 vision of hindsight," the focus remains on the "amount of force that is necessary in a particular situation." 490 U.S. at 396-97 (emphasis added). Qualified immunity, by contrast, focuses on the amount of force that reasonably, albeit mistakenly, *could have been perceived* as constitutionally permissible in light of a particular situation *and* the law as clearly established at the time.

These standards, at first blush, may sound similar, but the two inquiries should not be collapsed merely for the sake of convenience. The inquiries governing excessive force and qualified immunity, though similar, have subtle nuances. More importantly, they address different legal concerns.

It is logical that an analytical gap exists between qualified immunity and excessive force, because the two standards serve different purposes. *Graham* defines the circumstances under which liability for an excessive force constitutional violation will arise. Qualified immunity, by contrast, defines the circumstances under which liability for a constitutional violation will be excused – namely, circumstances where the law is not clearly established at the time, or where an officer reasonably, albeit mistakenly, could have believed his conduct did not violate constitutional rights of which a reasonable officer would have known. Qualified immunity reflects a public policy choice, and it is a creature of compromise. The doctrine balances the need to promote public service and shield officers from

monetary liability in circumstances where they act reasonably, albeit in derogation of the Constitution.

The Fifth Circuit's analysis in this case makes clear that it was deciding the qualified immunity issue. Petitioners based their entire case on the argument that Castillo's undisputed non-stop kicking, yelling and struggling was because of some panic reaction to his positional asphyxia. The Fifth Circuit, however, focused on the issue of whether a reasonable officer **could have perceived** Castillo's actions as continued resistance to arrest. Petitioners' App. 11 (emphasis added). This issue arises and is relevant in a qualified immunity analysis but not in an analysis based solely on a Fourth Amendment violation under *Graham*. *Behrens* expressly authorizes courts of appeals to make such determinations. 516 U.S. at 313. The fact that such an appeal may result in the grant of summary judgment even though existing fact disputes, when viewed in the light most favorable to the non-movant, are ultimately not material to the resolution of the qualified immunity issue, does not mean that appellate courts will have jurisdiction over every appeal. Courts always have jurisdiction to determine their jurisdiction. The Fifth Circuit's procedures for interlocutory appeals do not change that reality.

Petitioners cite to *Colston v. Barnhart*,[9] and *Elliott v. Leavitt*,[10] as evidence that appellate courts lack consistency on the issue of their jurisdiction to decide when it

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[9] 146 F.3d 282 (5th Cir. 1998) (on denial of pet. reh'g *en banc*), *cert. denied*, 119 S. Ct. 618 (1999).

[10] 105 F.3d 174 (4th Cir. 1997) (on denial of pet. reh'g *en banc*), *cert. denied*, 521 U.S. 1120 (1997).

has jurisdiction in an interlocutory appeal of the denial of summary judgment based on qualified immunity. Both the Fifth Circuit in *Colston*, and the Fourth Circuit in *Elliott* held, in *en banc* decisions which this Court refused to review, that they had such jurisdiction over an interlocutory appeal of the denial of summary judgment in a police excessive force case in which the objective legal reasonableness of the officer's actions was decided as a matter of law. Petitioners cite to no other cases in which this precise issue has been decided to the contrary. Thus there is no actual split between the circuits on the matter at issue in this appeal, and the Fifth Circuit's unpublished *per curiam* opinion does not compel this Court to exercise its supervisory power to grant certiorari as there has been no significant departure from the accepted and usual course of judicial proceedings in the Fifth Circuit opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Fifth Circuit Court of Appeals

Appellants' Response and Objection to Appellees' Motion to Permit Filing of Petition For Rehearing in Present Form A-1

Fifth Circuit Court of Appeals

Order Denying Rehearing in Its Present Form A-6

CASE NO. 98-50163

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANCISCA CASTILLO; OLIVIA LOPEZ; JOHN CASTILLO; MARY CARLEEN; FRANCIS DELGADO; LUIZ CASTILLO; GILBERT CASTILLO; RAYMOND CASTILLO; RUSSELL CASTILLO; JOE CASTILLO; PETE CASTILLO; PAT SALAZAR; VICKI SHAW,
Plaintiffs – Counter Defendants – Appellees

v.

CITY OF ROUND ROCK, TEXAS; MICHAEL H. KINCAIDE, Officer, (4101); THOMAS C. JACOBS, Corporal; SAMMY LEDESMA, Officer, (4112)
Defendants – Counter Claimants – Appellants

APPEAL FROM CAUSE NO. A-96-CV-863
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION
Magistrate Judge Alan D. Albright

APPELLANTS' RESPONSE AND OBJECTION TO APPELLEES' MOTION TO PERMIT FILING OF PETITION FOR REHEARING IN PRESENT FORM

TO THE HONORABLE JUDGES OF THIS COURT:

COME NOW the City of Round Rock, Texas, Officer Michael H. Kincaid, Corporal Thomas C. Jacobs, and Officer Sammy Ledesma, in their official and individual capacities ("Appellants"), and file this their response and objection to the Appellees' Motion to Permit Filing of Petition for Rehearing in Present Form. In support of

same, Defendants would show unto the Court the following:

Appellants object to Appellees' Motion to Permit Filing of Petition for Rehearing in Present Form to the extent that it attempts to have this Court consider evidence that is not part of the summary judgment record for this interlocutory appeal. Appendix "2" to Appellee's Petition for Rehearing is a 209 page copy of the Videotaped Deposition of Michael Kincaid (the "Kincaid Deposition") without a signature page or certificate from the court reporter. In their Petition for Rehearing, Appellees specifically cite to excerpts from pages 56-57, 66-68, and 110-111 of the Kincaid Deposition. Petition for Rehearing of Appellees, pp. 4-6. The summary judgment record for this interlocutory appeal, however, contains only pages 1-4, 96-97, 108, 130-131, 141-142, 144-145, 153, 156-157, 160-162, and 210-212 of the Kincaid Deposition, which were submitted by Appellants (*see* Defendants' Appendix in Support of Defendants' Motions for Summary Judgment, Exhibit "G"); and pages 1-4, and 48-50 of the Kincaid Deposition, which were submitted by Appellees (*see* Plaintiffs' Appendix in Support of Plaintiff's Response to Defendants' Motions for Summary Judgment, Exhibit "H").

The Kincaid Deposition excerpts which Appellees offer in support of their motion for rehearing are not part of the summary judgment record. This Court interprets Rule 56 of the Federal Rules of Civil Procedure literally and renders judgment "*forthwith* if the pleadings, depositions, answers to interrogatories, and admissions **on file**, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law." *Little v. Liquid Air Corp.* 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) (bold added). Thus, it is inappropriate, if not sanctionable, for counsel for Appellees to request that this Court consider evidence outside of the appellate record.[1]

Appellants note that Appendices "3" and "4" to the Petition for Rehearing of Appellees are already part of the summary judgment record and, thus, have been and are available for this Court's consideration. *See* R. pp. 685; 684-881. Appellants express no opinion on Appellees' submission of record evidence for the convenience of the Court, although we note that this Court's rules do not allow for such submissions with a petition for rehearing.

WHEREFORE, PREMISES CONSIDERED, Appellants pray that the Court overrule Appellees' motion to permit

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[1] Counsel for Appellees attempt to justify this request by noting that the deposition of Officer Michael Kincaid was "the subject of a great deal of debate at the oral argument." Motion to Permit Filing, p. 2. The primary, if not sole, reason that the debate at oral argument occurred was because the Court recognized that Counsel for Appellees based his argument on evidence not supported by the summary judgment record. Counsel for Appellees' misleading and erroneous representations to this Court that its Appendix 2 (the Kincaid Deposition) was "previously attached as Exhibit H to Plaintiffs' Appendix in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment" – *see* Petition for Rehearing, p. 3 – and that it contains "documents that are included in the transcript," – *see* Motion to Permit Filing, p. 2 – are truly perplexing and disturbing. Nonetheless, even if the evidence were part of the record in this appeal, Appellants contend that it would not be dispositive of any issue addressed in this Court's opinion.

the filing of its Petition for Rehearing in its present form as it does not comply with this Court's rules.

Respectfully submitted,

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ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellants' Response and Objection to Appellees' Motion to Permit Filing of Petition for Rehearing in Present Form has been sent by facsimile and Certified Mail, Return Receipt Requested to:

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and via Federal Express for delivery on April 8, 1999 to Charles R. Fulbruge III, Clerk of the Fifth Circuit Court of Appeals, 600 Camp Street, New Orleans, Louisiana 70130 pursuant to Fed.R.App.P. 25(a)(2)(B) on this 7th day of April, 1999.

KEVIN W. COLE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50163

FRANCISCA CASTILLO; OLIVIA LOPEZ; JOHN CASTILLO; MARY CARLEEN; FRANCIS DELGADO; LUIZ CASTILLO; GILBERT CASTILLO; RAYMOND CASTILLO; RUSSELL CASTILLO; JOE CASTILLO; PETE CASTILLO; PAT SALAZAR; VICKI SHAW

Plaintiffs – Counter Defendants – Appellees

v.

CITY OF ROUND ROCK, TEXAS; MICHAEL H. KINCAIDE, OFFICER, (4101); THOMAS C. JACOBS, Corporal; SAMMY LEDESMA, Officer (4112)

Defendants – Counter Claimants – Appellants

Appeal from the United States District Court for the Western District of Texas, Austin

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ORDER:

IT IS ORDERED that Appellees' motion to file petition for rehearing in its present form is DENIED. Appellees shall have until April 22, 1999, to file a petition for rehearing in compliance with the rules.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES
CIRCUIT JUDGE

MOT-21

(4)

Supreme Court, U.S.
FILED
NOV 1 1999
CLERK OF THE SUPREME COURT

No. 99-219

In The

Supreme Court of the United States

FRANCISCA CASTILLO, GILBERT CASTILLO, AS ADMINISTRATOR OF THE ESTATE OF JESUS CASTILLO, DECEASED,

Petitioners,

v.

CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) AND OFFICER SAMMY LEDESMA (#4112),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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14pp

PETITIONERS' QUESTIONS PRESENTED RESTATED

1. Is the police practice of restraining an arrestee, face-down with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia objectively reasonable as a matter of law?

2. Is the police policy of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia constitutionally protected as a matter of law from claims of deliberate indifference to a substantial risk of severe medical harm?

3. Is the police practice of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia an objectively unreasonable application of deadly force contrary to the teachings of *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)?

4. Does the Court of Appeals for the Fifth Circuit ruling in *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997), pet. reh'g en banc denied, 146 F.3d 282 (5th Cir. 1998), cert. denied, 119 S.Ct. 618 (1999), applied here so as to allow interlocutory review of excessive force, use of deadly force, and deliberate indifference to medical needs claims where the district court denied summary judgment, findings that material fact issues regarding the actions taken by police officers existed, violate the rule in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and the finality rule of 28 U.S.C.

PETITIONERS' QUESTIONS PRESENTED RESTATED – Continued

§ 1291 which prohibits interlocutory review of issues of law not separable from the fact determination necessary to their resolution?

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STATEMENT OF THE CASE

Respondents misrepresent the initial encounter between Officer Kincaide and Mr. Castillo, claiming that Officer Kincaide felt "threatened" by Mr. Castillo when Mr. Castillo raised his arm and drank a beer after he had first placed the 12-pack of beer on the ground pursuant to Kincaide's instruction. (Brief in Opposition, Pg. 4) By Respondents' time-line, Mr. Castillo, while still standing, stated that "someone" was "going to die", a statement that Officer Kincaide claims that he "perceived" as a "threat" (Brief in Opposition, Pg. 4) This statement conflicts with both Officer Kincaide's initial statement on how the offense occurred, as well as with statements by civilian witnesses. The first time Officer Kincaide claimed to feel threatened by Castillo was at his deposition, 16-months after the incident. (R. 775-77)[1]

Five days after the incident on January 10, 1995, Officer Kincaide provided a handwritten statement to Round Rock Police Department. (R. 649) The statement does not claim that Kincaide was threatened in any way by Mr. Castillo. Interestingly, Kincaide's handwritten statement quotes Mr. Castillo as saying, "I was going to die," apparently (attributing it as an exact quote of Mr. Castillo) Kincaide never claims that Mr. Castillo stated

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[1] Respondents' counsel was present during the deposition of his client in his office as indicated by his own submission to the District Court. (R. 775-77) The Deposition was taken May 19, 1997. Both Volumes of Officer Kincaide's deposition were reviewed by Defendants' use of force expert, Albert Rodriguez, (R. 683) as well as by Plaintiffs' expert on police practices, Dr. Peter Scharf. (R. 733-756) Both parties relied on this deposition as part of the record of this cause.

that he, Kincaide, was going to die. Kincaide cites no other contact by Mr. Castillo. (R. 649)

Respondents conveniently ignore witness Elizabeth Maya (R. 881-882) who states in a written affidavit that Mr. Castillo did not act in a threatening manner, and witnesses David Barrera (R. 718-719) and Andres Leal, Jr., both of whom gave clear accounts to Round Rock Police Department on January 5, 1995, within an hour after the incident occurred, that Mr. Castillo was held down by the officers and civilians and was shouting, "I am going to die" and "Please God, help me."[2]

The witness statements presented in the summary judgment record established that Mr. Castillo was held down by Officer Kincaide and others with great pressure exerted on his back during the struggle. (R. 713-714); (R. 718-719); (R. 721); (R. 723-724); (R. 726); (R. 730-31); and (R. 684-700).

The Respondents also contend that Mr. Castillo was rolled over onto his back within seconds of restraining his legs with flex-cuffs, however, Officer Ledesma's hand-written statement indicates that it was not seconds, but minutes, which passed before Mr. Castillo was turned over on his back. (R. 652). Mr. Castillo was not monitored

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[2] David Barrera's statement was made January 5, 1995, at 5:13 p.m. (R. 718-719) and Leal at 5:30 p.m. (R. 721) Although apparently misdated by a month, it is apparent that the Leal statement was made January 5, 1995, right after the incident and not a month later. David Barrera claims that Mr. Castillo was being held down when he stated in Spanish "Me voy a murir." Leal said Mr. Castillo said in Spanish, "It is time for me to die." (R. 718-719)

while being forced in a prone position with pressure on his back. (R. 647-48; 649, 652-53)

While Respondents are going to great lengths to discuss the timing of the events, they ignore unrefuted medical facts from Travis County Medical Examiners' and EMT records. Dr. Roberto Bayardo, M.D. states in his affidavit, "I believe that Officer Kincaide had adequate time to recognize Mr. Castillo's breathing difficulties. A person's heart will not stop beating due to lack of oxygen, unless they have gone without breathing for at least 3-4 minutes, even during a struggle." (Appendix A-38 to Petition for Certiorari) Dr. Bayardo recounts that pressure applied to Mr. Castillo's back for at least 4-6 minutes with oxygen deprivation handcuffed in a prone position, "will not only cut off oxygen, but cause the subject to struggle to get a breath, a scenario described by the various police officers and civilian witnesses." (*Id.*) Dr. Bayardo persuasively states an opinion echoed by Petitioners' police expert, Dr. Peter Scharf, that "placing an arrest suspect in such a position with pressure applied to his back for as little as 4-6 minutes, coupled with additional struggle by the suspect, is a classic example of a substantial risk of death or serious injury by positional asphyxia." (*Id.*)[3] EMT records indicate that upon arrival Mr. Castillo was still cuffed at the hands and feet while a fireman was attempting CPR. (R. 849-858) Upon arrival, the EMT personnel and Round Rock Fire Department noted Mr. Castillo had no blood

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[3] Dr. Bayardo points out that "Officer Kincaide did not attempt to investigate Mr. Castillo's medical condition and did not roll him over until after Mr. Castillo had gone into cardiac arrest." (Petitioners' Appendix A-38)

pressure, no pulse, no respiration, no heart beat, no eye response, no verbal response nor motor response, and was in full cardiac arrest. (R. 849-858)[4]

PETITIONERS' REPLY TO RESPONDENTS' REASONS FOR DENYING WRIT

I. RESPONDENTS' REASON I "RESTATED"

["The Fifth Circuit's opinion is not in conflict with any other United States Court of Appeals' decision or with any prior Fifth Circuit decision as this case does not involve "hog-tying."]

The Respondents' Brief in Opposition attempts to distinguish *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998), by drawing distinctions between the specific restraint utilized by the officers herein. This is a

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[4] Respondents claim that medical treatment was offered by the police department, but neither the EMT records, nor the officers' statements reflect same. (R. 848-859)

Once again attempting to craft the facts, Respondents mention that Mr. Castillo had an enlarged heart without pointing out Dr. Bayardo's affidavit in which the Medical Examiner states "I do not believe an enlarged heart played any role in this death." (Petitioners' Appendix A-36). Likewise Respondents state that Mr. Castillo was struggling because of a probable drug related agitated state. (R. 700), an accurate statement of the medical examiner's report following the autopsy on January 13, 1995, but fails to mention the toxicology findings dated several days later indicating no drugs of any type were found in Mr. Castillo's blood. Speculation on cause of the struggle came from police report by investigator William Avila of the Round Rock Police Department who was present at the autopsy, but not borne out by the toxicology finding. (Petitioners' Appendix A-44-51)

distinction without a difference.[5] Whether a suspect restrained behind the back and lying face down is hog-tied (by Respondents' restricted definition hands bound to feet) begs the question. "Hog-tying" is a subset of those improper restraint procedures which cause serious and substantial risk of sudden death through positional asphyxia.[6] In a recent Georgia Law Review article,[7] the author notes that "many in custody deaths around the country have been attributed to positional asphyxia." While hog-tying is discussed, it is clear that the danger of in custody deaths exists when an arrestees' arms are pulled behind his back and he is placed face down. Weight applied to the back increases the danger.

Respondents further argue that the restraint utilized, does not constitute "deadly force" as a matter of law. The

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[5] Contrary to Footnote 4 of Respondents' Brief, Petitioners would show that the report of Dr. Peter Scharf is properly part of the record. First, Dr. Scharf specifically references his report in his sworn declaration as reflected at Petitioners' Appendix A-57. Further, the District considered Dr. Scharf's report, and, an objection now raised is untimely.

[6] The U.S.D.J. through the National Institute of Justice has warned police departments across the nation about such restraint procedures and the potential for causing sudden death through positional asphyxia that occurs when, "a person lying on his stomach has trouble breathing when pressure is applied to his back." As that condition becomes more serious, the suspect struggles to get a breath resulting in increased compression to the back. *Positional Asphyxia – Sudden Death*. The National Law Enforcement Technology Center, U.S.D.J., June 1995. See reference Declaration of Peter Scharf. (R. 735-756) Affidavit of Dr. Roberto J. Bayardo, Medical Examiner of Travis County, Texas. (R. 684-732)

[7] 33 Ga. L. Rev. 281, 282 (Fall 1998)

Respondents' effort to totally disregard or minimize the competent summary judgment evidence submitted by the Petitioners in the form of the Affidavit of Travis County Medical Examiner, Dr. Roberto J. Bayardo, who performed the autopsy on Mr. Castillo and the Declaration and Report of Dr. Scharf, a police procedures and use of force expert, must fail. The Respondents' complaint that Dr. Scharf fails to comment on the degree to which banning use of the prone position would hamper effective law enforcement is not outcome determinative to whether or not the restraint against Mr. Castillo constituted "deadly force." Likewise, Respondents' complaint that Dr. Scharf does not acknowledge that Mr. Castillo was resisting arrest is without merit. Dr. Scharf specifically identifies the materials reviewed in reaching his opinions.[8]

Without restating evidence previously submitted to the Court, Petitioners would show that Respondents' statement of "Undisputed Summary Judgment Evidence" on Pg. 10 of its Response, is actually a set of conclusions favorable to the Respondents' defense. Statements that Mr. Castillo resisted arrest and that he was turned over as soon as his feet were cuffed are disputed facts.[9] Respondents attempt to analogize the facts in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), cert.

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[8] These materials include, the depositions, police reports and Statements of Officer Kincaide, Officer Ledesma and Corporal Jacobs. It is beyond question that Dr. Scharf was aware of the officers' alleged perception at the time he rendered his sworn opinions. (R. 735-756)

[9] Ledesma states in his handwritten statement that Castillo was turned over "moments later." (R. 652)

denied, 118 S.Ct. 1052 (1998) with the instant facts, however, the amount of force utilized is different, the violent behavior of the Phillips arrestee contrasts with Castillo's actions and no monitoring was done for Castillo as was for the Phillips arrestee. *Phillips* at 592-595.

II. RESPONDENTS' REASON II "RESTATED"

["An appellate court does not violate the rule in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), or the finality rule of 28 U.S.C. § 1291 which prohibit interlocutory review of issues of law not separable from the fact determinations necessary to their resolution, when it determines whether a police officer's use of force meets the *Harlow* standard of "objective legal reasonableness" in an interlocutory appeal of the denial of summary judgment based on qualified immunity."]

Respondents claim that the "objective legal reasonableness" criteria for determining excessive force and qualified immunity can be distinguished. Respondents argue that regardless of facts proving the use of excessive force that an officer may still have qualified immunity if a reasonable officer *could have perceived* the actions of the arrestee as necessitating the excessive force. In its decision, the Fifth Circuit also utilized this distinction in holding that Kincaide could have perceived Castillo's actions as threatening and resisting arrest. By approaching excessive force and qualified immunity in this manner, the Fifth Circuit Court has side stepped the fact finding process and prohibited the Petitioner from presenting evidence of credibility to the fact finder. In this way, the Respondents have attempted to make the issues

in this case a "matter of law" so as to invoke the jurisdiction of the appellate court.

Other circuit courts have not recognized the distinction between the legal standard in determining excessive force and qualified immunity and have held that if fact issues exist which could result in a finding for the plaintiff on the excessive force issue or the jury has rendered a finding for the plaintiff on the excessive force issue, then the officer is deprived of qualified immunity. The cases in disagreement with the Fifth Circuit include *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991), *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996), *Alexander v. County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995), *Roa v. Inhabitants of Lewiston*, 42 F.3d 691 (1st Cir. 1994),*Wardlaw v. Pickett*, 1 F.3d 1297 (D.C. Cir. 1993), and *Jackson v. Hoylman*, 933 F.3d 401 (6th Cir. 1991). In these circuits, a determination of unreasonable force precludes a favorable finding on qualified immunity because the test for each is identical.

Petitioners would show that the standard for determining excessive force and the officer's entitlement to qualified immunity is the same, and, therefore, factual issues in this case are inseparable from Petitioners' cause of action. Therefore, the Appellate court did not have jurisdiction over this case because it fails to satisfy the finality rule of 28 U.S.C. § 1291 and violates the holdings in *Johnson v. Jones*, 515 U.S. 304 (1995) and *Behrens v. Pelletier*, 516 U.S. 299 (1996).

CONCLUSION

For the reasons set forth in Petitioners' Petition for Writ of Certiorari, and this Reply Brief, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

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